Supreme Court, U.S.

(1)

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In The

Supreme Court of the United States

OCTOBER TERM 1998

STEPHEN S. ADAMS, et al.
Petitioners,

v.

JAMES F. HINCHMAN, et al.
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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February 5, 1999

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QUESTION PRESENTED

1. Did the court below err in upholding the Government Accounting Office's reversal of its long-standing interpretation of the Portal-to-Portal Pay Act to shorten the limitations period for Fair Labor Standards Act administrative claims, when the GAO's new interpretation was inconsistent with the language and purpose of the statute, inconsistent with judicial interpretations of the statute, and undertaken for an improper purpose in violation of petitioners' due process rights?

LIST OF PARTIES

There are more than 14,000 parties in this case. They are listed separately in a Lodging filed with the Court simultaneously with this Petition. All parties are individuals, government officials, and/or government entities.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Adams et al. respectfully request this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit upholding the General Accounting Office's decision to dramatically shorten the limitations period governing Fair Labor Standards Act claims by reversing more than forty years of consistent statutory interpretation, undertaken as the GAO faced massive claims for relief for wages that had been unlawfully withheld by the government.

OPINIONS BELOW

The decision of the United States Court of Appeals for the District of Columbia Circuit, reported as *Adams v. Hinchman*, 154 F.3d 420 (D.C. Cir. 1998), is set forth in Appendix A. The opinion of the United States District Court for the District of Columbia, reported as *Adams v. Bowsher*, 946 F. Supp. 37 (D.D.C. 1996), is set forth in Appendix B. The orders of the United States Court of Appeals for the District of Columbia Circuit, denying rehearing to both appellants and appellees, are set forth in Appendix C.

JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit issued its opinion on August 28, 1998. Petitioners and respondents timely filed petitions for rehearing. The Court of Appeals denied these petitions on November 9, 1998. Therefore, the jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional provision, the pertinent portion of which is set forth below:

> No person shall be . . . deprived of life, liberty, or property without due process of law . . .

U.S. Const. amend. V.

This case involves statutory provisions from the Barring Act, 31 U.S.C. § 3702 (1994), and the Portal-to-Portal Pay Act, 29 U.S.C. § 255, the pertinent portions of which are set forth below:

§ 3702(b)(1): . . . The claim must be received by the Comptroller General within 6 years after the claim accrues except -- (A) as provided in this chapter or another law . . .

§ 255: Any action . . . to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938. . .

> (a) if the cause of action accrues on or after May 14, 1947 -- may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.

STATEMENT OF THE CASE

This petition seeks review of a federal appellate decision upholding the General Accounting Office's ("GAO") reversal of its long-standing interpretation of the governing statutes to dramatically shorten the limitations period applicable to administrative processing of federal employment claims, in the face of massive claims for such relief.

The Determination That Thousands of Federal Employees Were Unlawfully Underpaid

A number of government agencies paid criminal investigators and other law enforcement officers as if they were exempt from certain provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §201 *et seq.*, and refused to provide them the overtime compensation mandated by the FLSA. Thousands of these employees brought suit in the Court of Federal Claims. Pet. App. 1a-2a.

In 1992, that court determined, in a consolidated action, that certain grades of employees at the Bureau of Alcohol, Tobacco and Firearms, the Drug Enforcement Agency, the Internal Revenue Service, the Secret Service, and the Customs Service should not have been classified as exempt, and had been entitled to overtime pay under the FLSA. *Id.* at 2a. In 1994, the plaintiffs found non-exempt by the Court of Federal Claims entered into settlement agreements with the government that provided back pay for the two-year period preceding suit, and thereafter. The settlements expressly preserved their rights to pursue administrative remedies for earlier periods before GAO. *Id.* at 2a.

Proceedings Before the GAO

At the same time each filed suit in the Court of Federal Claims, the 14,122 petitioners filed administrative claims with the GAO. Pet. App. 2a. On April 12, 1994, petitioners advised GAO of the Court of Federal Claims' decision and the settlements and reminded the GAO that it applied the six-year limitations period provided by the Barring Act to administrative claims filed by federal employees. *See id.* The Barring Act is the statute that confers authority on the GAO to determine the validity of such claims and order payment. *Id.* at 2a-3a. Soon after the FLSA was made applicable to federal employees, the GAO had determined that the two-year limitations period provided for FLSA actions in the Portal-to-Portal Pay Act ("Portal Act") applied only to *judicial* proceedings, and that *administrative* FLSA claims were governed by the six-year limitations period provided in the Barring Act. *Id.* at 3a (citing *Transportation Systems Ctr.*, 57 Comp. Gen. 441 (1978)).[1/] Petitioners did not seek relief for the time period covered by the settlements; they sought relief for violations that had occurred earlier, within the six-year limitations period provided by the Barring Act.

On May 23, 1994, less than six weeks after being placed on notice that thousands of current and former employees had valid administrative claims pending before it, the GAO reversed its long-standing interpretation of the Portal Act and held, in a case similar to petitioners', that the Act's two-year statute of limitations also governs administrative claims. Pet. App. 4a n.4, 14a. The GAO also expressly stated its intention to apply the two-year limitations period to all FLSA claims it determined in

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1/ In cases of willful violation, the Portal Act provides a three-year limitations period. That provision is not at issue here.

the future. *See In re Joseph M. Ford*, 73 Comp. Gen. 157, 161 (1994) (involving an FLSA claim submitted by an Air Force fire inspector).

A few weeks later, Senator Sarbanes introduced legislation to protect employees who had filed FLSA claims before *Ford* was decided, and up to five weeks afterward, from the harsh effect of the dramatically shortened limitations period. The provison was enacted on September 30, 1994, as Section 640 of the Treasury, Postal Service and General Government Appropriations Act of 1995. Pet. App. 4a-5a. It provided:

> In the administration of Section 3702 of title 31, United States Code, the Comptroller General of the United States shall apply a 6-year statute of limitations to any claim of a Federal Employee under the Fair Labor Standards Act of 1938 . . . for claims filed before June 30, 1994.

Id. at 5a.

Petitioners again contacted the GAO and requested a meeting to resolve their claims -- some of which had been pending since February 1990 -- in light of Section 640, the legislation Congress had just passed. *Id.* The GAO refused to meet and informed petitioners that they were required to file their claims with the agencies for which they worked, and await initial adjudication by those agencies, before the GAO would consider them. *Id.* at 5a-6a. Petitioners then submitted their claims to their employing agencies, all five of which reached the same conclusion: Section 640 governed only decisions by the Comptroller General and not decisions by the employing agencies. Each employing agency therefore disregarded the

applicable OPM guideline,[2] and denied petitioners' claims. *Id.* at 6a.

Petitioners appealed these denials to the GAO, but "the GAO did not respond." *Id.* The agencies were lobbying Congress to repeal Section 640 in order to avoid paying the valid FLSA claims pending before the GAO.[3] And the GAO had decided to simply refuse to consider any pending FLSA claims in the meantime. Thus, the GAO informed the personnel director of the Customs Service, with respect to one pending FLSA claim, that it would not issue a decision until Congress had a chance to repeal Section 640 in the 1996 Appropriations Bill. Pet. App. 6a. The GAO also informed Senators Kay

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2/ The applicable OPM guideline, Federal Personnel Manual Letter 551-18, directed agencies to pay valid FLSA claims for wages for up to 6 years before the claim was filed.

3/ *See* J.A. 241-42 (Nov. 20, 1995 letter to C.G. Vendel from Linda L. Robertson, Assistant Secretary, Department of the Treasury, explaining Treasury's decision to seek repeal of Section 640 to avoid the cost of paying the thousands of pending claims filed by criminal investigators with GAO); J.A. 240 (Nov. 20, 1995 letter from Robertson to T.J. Hanes regarding the legislative initiative undertaken by the Department of the Treasury to repeal Section 640 because of the "significant impact" on its operating budget); J.A. 223-24 (May 12, 1995 letter from G. Muñoz, Assistant Secretary of the Treasury, to Sen. Richard C. Shelby, Chairman, Subcommittee on Treasury, Postal Service and General Government Appropriations; J.A. 225-26 (June 22, 1995 letter from Stephen R. Colgate, Assistant Attorney General, to Rep. Harold Rogers, Chairman, Subcommittee on Departments of Commerce, Justice and State, Judiciary, and Related Agencies Appropriations).

Bailey Hutchison and Nancy Kassebaum that it had temporarily suspended consideration of *all* pending FLSA claims while the Department of the Treasury sought to have Section 640 repealed. *See* J.A. 227-28 (Aug. 2, 1995 letter from Robert L. Higgins, Associate General Counsel, GAO, to Sen. Hutchison; Oct. 31, 1995 letter from Joseph L. McCann, Senior Attorney, GAO, to Sen. Kassebaum).

The agencies' efforts were successful. The House Committee directed the Office of Management and Budget to estimate the cost of paying pending claims, and postponed consideration of Section 640 until conference when such estimates would be available. *See* H.R. Rep. 104-183 at 43 (1995). At conference, an amendment that all but repealed Section 640 was added "at the administration's request." 141 Cong. Rec. H12376 (daily ed. Nov. 15, 1995) (statement by Rep. Lightfoot, chairman of the House Appropriations Treasury subcommittee, sponsoring adoption of the conference bill). Presenting the bill to the House, Rep. Lightfoot further explained the "problem" with the original Section 640 was that it would "cost as much as $460 million -- nearly the entire Secret Service budget." *Id.* He explained that the practical choice before the conferees was to "either pay hundreds of millions for work done many years ago" or amend Section 640 to extinguish the remedies owed to those federal workers under Section 640. *Id.* The amendment was enacted in November 1995.[4/] Pet. App. 6a.

4/ The amendment added the following:

> This section shall not apply to any claim where the employee has received any compensation for overtime hours worked during the period covered by the claim under

(continued...)

After the amendment was enacted, the GAO denied the Customs Service employee claim it had admittedly stalled pending the hoped-for repeal of the original Section 640, based on the amendment that was enacted. *In re Marvin B. Atkinson*, 1996 WL 31212 (C.G. Jan. 29, 1996). Petitioners were intervenors in *Atkinson*. Pet. App. 7a.

Proceedings Below

Petitioners brought an action for declaratory judgment and mandamus on October 27, 1995, challenging the GAO's adoption of the shortened limitations period and protesting, *inter alia*, the GAO's refusal to decide their appeals. Pet. App. 8a.[5/] On October 10, 1996, the district court granted summary

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(...continued)

> any other provision of law, . . . or to any claim for compensation for time spent commuting between the employee's residence and duty station.

Pub. L. No. 104-52, 109 Stat. 468 (1995). The first clause excluded, from Section 640 protection, employees who had been paid Administratively Uncontrollable Overtime wages, *see* 5 U.S.C. § 5545(c)(2), rather than the higher FLSA wages to which the Court of Federal Claims found they were entitled.

5/ Petitioners challenged the GAO's new interpretation of the applicable limitations period, and its extended suspension of proceedings on FLSA claims, under the Declaratory Judgment Act, the Administrative Procedure Act, and 28 U.S.C. § 1361, as arbitrary, capricious, inconsistent with the relevant statutory provisions, contrary to their due process rights, a violation of the equal protection guarantee, a violation of the Takings (continued...)

judgment to the government and denied summary judgment to petitioners. Pet. App. 13a. The district court expressly upheld the GAO's new interpretation of the Portal Act. *Id.* at 21a, 27a. On August 28, 1998, the court of appeals affirmed, except with respect to the district court's Takings Clause decision. The court remanded the takings issue to the district court to determine its jurisdiction to decide the claim. *Id.* at 10a-12a. Although petitioners had squarely challenged the GAO's new interpretation of the Portal Act in their briefs on appeal, the court of appeals simply acknowledged the trial court's decision on this question, *id.* at 9a, and affirmed that and other decisions "substantially for the reasons" stated by the district court, without any discussion of the merits. *Id.* at 8a, 10a.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for two reasons. First, in a nation under the rule of law, the government cannot be permitted to simply reinterpret laws that govern its own actions, after the fact, in order to escape their consequences. Second, the GAO's reinterpretation, now governing all current and future administrative complaints under the FLSA, the Walsh-Healey Act, 41 U.S.C. §35 *et seq.*, and the Bacon-Davis Act, 40 U.S.C. §276a *et seq.*, is not consistent with the purpose or text of the statutory provision at issue, or with this and other courts' decisions interpreting it.

5/ (...continued)
Clause, and a violation of applicable procedural requirements. Petitioners asked, among other relief, for the court to declare that the limitations period applicable to administrative FLSA claims is six years, as provided by the Barring Act. *See* J.A. 4-26 (Complaint filed October 27, 1995 by Adams, *et al.*).

I. THIS CASE PRESENTS A SIGNIFICANT QUESTION THAT AFFECTS ALL ADMINISTRATIVE CLAIMS UNDER THE FLSA AND TWO OTHER FEDERAL STATUTES.

The GAO's decision, upheld by the court below, shortens the limitations period for all pending and future FLSA claims. The GAO expressly held that it would apply the Portal Act's two-year statute of limitations to claims pending before it or filed in the future. *See Ford*, 73 Comp. Gen. at 161. Congress' transfer of responsibility for these claims from the GAO to the OPM does not alter the impact.[6/] The OPM has adopted the GAO's new interpretation by regulation, codified at 5 C.F.R. §551.702(b). That regulation provides that every FLSA pay claim, filed on or after June 30, 1994, "is subject to the statute of limitations contained in the Portal Act of 1947, as amended, which imposes a 2-year statute of limitations, except in cases of a willful violation where the statute of limitations is 3 years." *Pay Administration Under the Fair Labor Standards Act*, 62 Fed. Reg. 67238, 67251 (Dec. 23, 1997) (citation omitted).[7/]

In addition, the decision below also establishes that the Portal Act's two-year statute of limitations governs administrative enforcement proceedings for violations of the Walsh-Healey and Bacon-Davis Acts brought by the United

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6/ The authority to settle wage claims of federal civilian employees was transferred from the GAO to the OPM on June 30, 1996. Pub. L. 104-53 § 211, 109 Stat. 535, *codified at* 31 U.S.C.A. § 3702(a)(2)(West Supp. 1998). The statutory provisions governing limitation periods were not changed.

7/ In adopting this regulation, the OPM relied in part on the district court's decision below. *Id.* at 67242.

States, because the limitations provision applies, without distinction, to all actions under all three federal statutes. Thus, if the limitations provision applies to administrative claims under the FLSA, it necessarily also applies to such claims under the other two statutes. Further, the provision does not distinguish between actions brought by individual employees and actions brought by the government, and has been found by this Court to apply equally to both. *See Unexcelled Chemical Corp. v. United States*, 345 U.S. 59 (1953) (government suit to enforce the Walsh-Healey Act barred by Portal Act's statute of limitations).

Absent this Court's review, the GAO's and OPM's new rule, now upheld by the D.C. Circuit, establishes the law governing most pending and all future administrative proceedings under the FLSA, the Walsh-Healey Act, and the Bacon-Davis Act. Thus, the issue before this Court is a significant one with a widespread affect on many claimants and administrative proceedings.

II. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT WITH OTHER COURTS' INTERPRETATIONS OF THE PORTAL ACT, AND TO REVERSE THE DECISION BELOW'S IMPERMISSIBLE READING.

Determining the statute of limitations applicable to administrative proceedings under the FLSA requires the proper interpretation of two statutes: the Barring Act, 31 U.S.C. § 3702, and the Portal Act, 29 U.S.C. § 255. There is no dispute as to the meaning of the terms of the Barring Act. That Act provides the GAO with the authority to hear claims against the United States, including wage claims brought by federal employees, and to determine their validity. *Id.* at §3702(a).

The limitations period for such claims is six years unless provided otherwise in the Barring Act or in another statute. *Id.* at 3702(b)(1).[8/] It is the interpretation of the Portal Act below that is in conflict with decisions of this Court and at least one court of appeals, and in tension with decisions of other courts of appeals.

A. The Portal Act And Its Long-Standing Interpretation

The Portal Act was enacted in 1947, nine years after the FLSA, in reaction to judicial interpretations of the FLSA. A key purpose of the Portal Act, Congress explained in the legislation itself, was "to define and limit the jurisdiction of the *courts*." 29 U.S.C. §251(b)(2) (emphasis added). It included a provision establishing a two-year limitations period for an "action" under the FLSA, the Walsh-Healey Act or the Bacon-Davis Act, unless the violation was willful, in which case the plaintiff had three years "after the cause of action accrued" to bring the "action." *Id.* at §255(a). Although the Portal Act had long been interpreted to apply *only* to judicial proceedings, by courts as well as by the GAO and other agencies, it was this statute the GAO relied on to shorten the limitations period for administrative claims in 1994.

8/ Laws establishing administrative authority to settle claims date back to the Nineteenth Century. That authority was transferred to the GAO in 1921. *See* 42 Stat. 24. The six-year limitations period (reduced from 10 years) was adopted in 1975. *See* 88 Stat. 1965. In 1982, Congress added: "except as provided in this chapter or another law" but made clear that the proviso was a clarification, not a substantive change. H.R. Rep. No. 97-651 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1895, 1897-99, 2025.

A few years after the Portal Act became effective, the GAO ruled that the Act's statute of limitations provision served only to limit the remedy available from *courts*, and had no application to administrative claims. *See L. Gary Clemente*, 33 Comp. Gen. 66 (1953) (Walsh-Healey Act proceedings). The Department of Labor's view, provided at the GAO's request, was that the Portal Act "only forecloses resort to *court* action after a two-year period" and that the remedy at issue under the Walsh-Healey Act "is left unaffected" by the passage of two years after the events at issue. *Id.* at 67 (emphasis added). The GAO agreed and found that Congress' use of "terms of art, appropriate only to foreclosing suits in the courts" made clear that Congress had not intended to include administrative claims. *Id.* Indeed, the GAO found Congress' failure to include administrative proceedings or to extinguish liability for the underlying violations was "deemed highly significant . . . especially relevant in view of the fact that Congress was undoubtedly aware at the time it passed the Portal Act that the Walsh-Healey Act provided the Government with a dual means of collecting sums due it . . . ." *Id.*

The GAO's long-standing interpretation of the Portal Act was consistent with its interpretation of other statute of limitations provisions. As early as 1949, the GAO found that administrative maritime claims were viable after the statute of limitations had run on an action in court. *See United States Maritime Comm'n*, 29 Comp. Gen. 54, 54-55 (1949) (noting "the authorities are clear that the statutes of limitations applicable to actions in the courts are not applicable to the settlement of claims before administrative departments of the government"). *See also Defense Communications Agency*, 51 Comp. Gen. 20, 22 (1971) (statute of limitations for "actions at law" to obtain communications charges does not impose time limit for administrative claims for the same charges) (noting it

had long been the GAO's position "that the time limitations for the commencement of such 'actions at law' do not affect the jurisdiction of our Office to consider claims against the United States and that, unless otherwise *specifically* provided for by statute, we are required, as a general rule, to consider any claim against the United States cognizable by our Office") (emphasis added).[9/]

After Congress made FLSA provisions applicable to federal employees, the GAO revisited the question whether the Portal limitations provision applied to claims filed with the GAO and determined, consistently with its earlier decisions, that it did not. *See Transportation Systems Ctr.*, 57 Comp. Gen. 441 (1978). The GAO concluded that the Portal Act's statute of limitations applied only to actions in court, and therefore the Portal Act's provision did not constitute "another law" that superseded the six-year limitations period provided in the Barring Act. Thus, the GAO held: "In the absence of any statutory provision limiting the authority of our Office to consider the claims of nonexempt Federal employees to overtime compensation under the FLSA, we hold that the time limitation for the filing of claims by Federal employees under the FLSA which may be considered by our Office is 6 years . . . ." *Id.* at 443-44. That view had also been urged by the predecessor to OPM, the Civil

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9/ The Attorney General took the same position. *See Commodity Credit Corp.*, 41 U.S. Op. Atty. Gen. 80, 82 (1951) (statute of limitations applicable to "suits" does not affect time period available for bringing administrative claims) (noting that the statute of limitations for actions cognizable by the claims court "has been consistently construed to have no application to the consideration and settlement of such claims by the executive departments," and discussing the purposes served by not imposing a judicial limitations period on administrative claims).

Service Commission. *Id.* at 443.

The GAO's subsequent decisions, until *Ford*, continued to interpret Section 255 of the Portal Act as applicable solely to actions in court. *See, e.g., In re Paul Spurr*, 60 Comp. Gen. 354 (1981); *Henry G. Tomkowiak*, 67 Comp. Gen. 247 (1988); *Federal Firefighters*, 68 Comp. Gen. 681 (1989). *See also Hickman v. United States*, 10 Cl. Ct. 550, 552 (1986) (recognizing the difference between the two-year limitations period for FLSA actions brought in court and the "longer administrative limitations period" for such claims).

B. The Decision Below Conflicts With This And Other Courts' Decisions.

The D.C. Circuit's decision to uphold the GAO's new interpretation of the Portal Act is flatly inconsistent with this Court's holding in *Unexcelled Chemical*. In a case arising shortly after the Portal Act was enacted, this Court held that the Portal Act's statute of limitations applied *only to* judicial proceedings. 345 U.S. at 66. The question was raised in a Walsh-Healey Act suit brought by the United States against a company accused of knowingly employing child labor. The Secretary of Labor had initially issued a complaint in 1947 which led to an administrative hearing. The Secretary did not institute judicial proceedings until 1950. The company asserted the limitations period in the Portal Act as an affirmative defense because more than two years had elapsed between the alleged employment and commencement of the judicial proceedings. The government attempted to defend on the ground that it had instituted administrative proceedings within the limitations period. This Court rejected that argument on the ground that the Act's limitations period applied only to judicial proceedings, concluding that, in enacting the limitations provision, "Congress

. . . was addressing itself to lawsuits in the conventional sense." *Id.* The Court explained further: "[c]ommencement of an action by the filing of a complaint has too familiar a history and the purpose of [this and related provisions] was too obvious for us to assume that Congress did not mean to use the words in their ordinary sense." *Id.*

In addition, the D.C. Circuit's decision below squarely conflicts with the Third Circuit's decision in *Glenn Electric Co., Inc. v. Donovan*, 755 F.2d 1028 (3d Cir. 1985). Glenn Electric asserted that the Portal Act statutory limitations period barred the administrative proceedings against it. The Department of Housing and Urban Development ("HUD"), which had initiated the proceedings, argued two grounds for finding that the Act did not apply. HUD's second argument was that the Act applied only to actions brought in court and not to proceedings before administrative agencies. 755 F.2d at 1034 n.7. Although the Third Circuit found for HUD on the first ground, it also chose to reach the second, and held that the Portal Act did not impose a limitations period governing the timeliness of administrative proceedings. The court found the fact that only administrative proceedings had been involved provided an alternative basis for its decision to reject Glenn Electric's statute of limitations defense. *Id.*

C. The Decision Below Misreads The Statute Relied On To Supersede The Barring Act's Six-Year Limitations Provision.

1. The Act's purpose and language make clear that Congress intended the Act to apply only to actions brought in court.

Although the conclusory nature of the opinions below do

not provide much insight into the courts' reasoning, their conclusion that the Portal Act's statute of limitations applies to administrative proceedings is inconsistent with both the Act's purpose and its text. As Congress explained in the statute itself, the Portal Act was enacted in response to judicial interpretations Congress found to constitute "a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce," 29 U.S.C. § 251(a), and enacted the statute to relieve that burden, to protect the right of collective bargaining, and to "define and limit the jurisdiction of the courts." *Id.* at § 251(b). Nothing in the statute suggests that Congress had any intention of limiting the availability of administrative remedies.

Moreover, provision after provision refers to procedures used in courts. Thus, Section 252(d) limits the jurisdiction of the federal *courts* to enforce liability for FLSA, Walsh-Healey Act or Bacon-Davis Act violations, but not the jurisdiction of any administrative body to enforce such liabilities, even though administrative proceedings to do so were common at the time. *See, e.g., Unexcelled Chemical*, 345 U.S. at 60 (noting administrative proceeding initiated in 1947 to enforce the Walsh-Healey Act); *L. Gary Clemente*, 33 Comp. Gen. at 67 (noting availability of administrative proceedings under Walsh-Healey Act in 1947). Sections 252(e) and 253 set rules applicable to any *cause of action* under the three statutes. Section 260 provides discretion to a *court* to deny liquidated damages when the employer *shows to the satisfaction of the court* certain facts establishing good faith.

The statutory language of the statute of limitations provision at issue, Section 255, likewise indicates that it was intended to apply solely to judicial proceedings. Thus, it expressly applies to "[a]ny action . . . to enforce any cause of

action" for specified remedies under the covered statutes. § 255. Further, in the statute's findings and declaration of policy, Congress explained that the provision was enacted to override "the varying and extended periods of time [provided] under the laws of the several States" -- laws that had been applied only by courts. § 251(a).

In addition, the sections further defining how the statute of limitations is to be applied are written in terms applicable to judicial proceedings only. Section 256, for example, sets forth the means by which the commencement of an action is established for purposes of applying the statute of limitations. It provides that an action is commenced

> on the date when the *complaint* is filed, except that in the case of a *collective or class action* . . . it shall be considered to be commenced in the case of any individual claimant
> (a) on the date when the *complaint* is filed, if he is specifically named as a party *plaintiff* in the complaint and his written consent to become a party *plaintiff* is filed on such date in the *court* in which the action is brought; or
> (b) if such written consent was not so filed or if his name did not so appear--on the subsequent date on which written consent is filed in the *court* in which the action was commenced.

§ 256 (emphasis added). The other section establishing a rule for implementing the statute of limitations explains that the limitations period will become applicable in pending collective or representative actions to individuals who were not named as a party plaintiff when the Act was passed or shortly thereafter only when the individual's written consent to become a party *plaintiff* to the action is *filed in the court in which the action*

was brought. § 256 (emphasis added).

In sharp contrast, when Congress has chosen to supersede the Barring Act's six-year statute of limitations for administrative claims filed with the GAO, it has done so specifically and unambiguously. In the Barring Act itself, Congress provided a different statute of limitations for claims by a member of the armed forces that accrue during war or within five years before war begins. Such a claimant has the longer of the ordinary six-year limitations period or a five-year limitations period commencing when peace is established. *See* 31 U.S.C. § 3702(2). Congress has also chosen to shorten the statute of limitations for specific administrative claims. *See, e.g.*, 31 U.S.C. § 3726, (expressly shortening the statute of limitations for administrative claims for transportation charges under section 322 of the Transportation Act of 1940 to three years);[10/] 31 U.S.C. § 3721 (establishing two-year statute of limitations for administrative claims by federal civilian employees or military personnel for damage to personal property; 31 U.S.C. § 3124 (one-year statute of limitations for administrative claims for FBI-caused personal injury or property damage).

Because the Portal Act was expressly enacted to limit the jurisdiction of *courts*, because the ordinary meaning of its statute of limitations implicates only judicial proceedings, and because Congress neither expressly nor impliedly provided for that limitations period to apply to administrative proceedings,

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10/ The GAO noted, in *Defense Communications Agency*, 51 Comp. Gen. at 23, that although the predecessor to this provision, 49 U.S.C. § 66, applied to claims filed with the GAO, and therefore superseded the Barring Act's general limitations provision, Section 66 applied only to certain transportation claims and not to the Communications Act claim before it.

the decision below is contrary to the purpose and language of the statutory provision and should be reversed.

2. *Nothing in the GAO's or the courts' opinions provide a basis to depart from the clear import of the statute.*

The sole ground provided by the courts below for upholding the GAO's interpretation of the Portal Act was that "there was nothing in the legislative record indicating congressional intent to impart a more liberal limitations period to federal employees than to employees in the private sector." Pet. App. 21a; *see also id.* at 8a (affirming for substantially the same reasons provided by the district court). Neither the district court, which made this statement, nor the court of appeals, which accepted it, explained further what was meant. Nor is the reasoning clear from the face of the statement.

For one thing, as both courts would necessarily agree, there was nothing in the legislative record indicating congressional intent with respect to federal employees at all -- for good reason. In 1947, when the Portal Act was under consideration, the FLSA did not apply to federal employees. The FLSA was not extended to federal employees until 1974. *See* 88 Stat. 58, 64; Pet. App. 3a. Moreover, the other two statutes covered by the Act's statute of limitations -- the Walsh-Healey Act and the Bacon-Davis Act, which impose wages and other requirements on government contractors -- have never applied to federal employees. Thus, the absence of any discussion in the legislative record of the comparative limitations periods available to federal and private employees reflects only the fact that the question had not yet arisen.

It may be that the district court did not intend to refer to

the legislative record of the Portal Act but intended to adopt the GAO's argument. The GAO had cited *Hickman v. United States*, 10 Ct. Cl. 550, 552 (1986), for the proposition that administrative claims must be subject to the same limitations period as court actions because Congress did not indicate an intention to extend a more liberal limitations period to federal than to private employees, when it extended the FLSA in 1974. *Hickman*, however, said no such thing. *Hickman* recognized, and did not question, that federal employees were subject to a "six-year administrative statute of limitations," *id.* at 552. What *Hickman* rejected was the argument that filing an administrative claim would "toll any applicable statute of limitations for the court action," an argument that would have provided federal employees with eight years to bring an FLSA action in court. *Id. Hickman* relied on the fact that Congress did not change the limitations period for actions in *court* when it extended the FLSA to federal employees to conclude that federal employees "do not gain the benefit of the *longer* administrative limitations period in their court action." *Id.* (emphasis added). Thus, the rule from *Hickman* is that the two-year limitations period for *court* actions applies to both federal and private employees.

Hickman provides no support for the GAO's or the courts' below shortening the limitations period for *administrative* claims because that court read the Portal Act provision as applicable solely to court actions and acknowledged that the limitations period for administrative claims was "longer" than the limitations period for actions brought in court. Moreover, the fact that Congress did not impose a statute of limitations on FLSA administrative claims when it extended FLSA protections to federal employees argues, if anything, that Congress did not object to the limitations period it had already enacted for administrative claims becoming available for FLSA claims, just as it remains available for other federal employee wage claims.

See Ford, 73 Comp. Gen. at 162 n.8.[11/]

The GAO's other stated basis for reversing its long-standing interpretation of the Portal Act, a position the district court appears to have embraced tangentially, Pet. App. 21a, was that expiration of the statute of limitations in the Portal Act necessarily extinguished the underlying rights and liabilities of the parties under the FLSA. *See Ford*, 73 Comp. Gen. at 160-61. For this position, the GAO cited two cases, neither of which supports its conclusion.

For example, the first case, *William Danzer Co. v. Gulf & Ship Island Railroad Co.*, 268 U.S. 633, 637 (1925), held only that some statutes of limitation, which are "part of the definition of a cause of action created by the same or another provision" operate as a limitation upon liability, whereas other statutes of limitation "are held to apply to the remedy only." The provision at issue in that case was found to operate as a limitation upon liability because the statute both provided an administrative complaint procedure and imposed a two-year limit on bringing such complaints. *Id.* at 635-36.

In contrast, the federal employees here indisputably enjoy both a right of action in court for FLSA violations and the right to file an administrative claim. Moreover, the statute of limitations at issue was enacted, not as part of the statute that provided either right, but in a later statute, and the provision

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11/ Certainly Congress has provided for differential treatment of federal and private employees in other ways. *See, e.g.*, 29 U.S.C. § 216(c) (authorizing the Secretary of Labor to bring class actions on behalf of only private employees for FLSA violations); 29 U.S.C. § 259 (providing a good faith defense to only private employers).

expressly refers only to actions in court. Thus, *Danzer*, far from supporting the decision below or the GAO, supports the opposite conclusion, that the Portal Act's statute of limitations belongs to the class of such statutes that "apply to the remedy only." *Id.* at 637.

Indeed, every court that has expressly considered whether the particular statute of limitations provided by the Portal Act is a limit on the remedy or a substantive limitation on liability has held that Section 255 is merely a limit on the remedy. *See, e.g., Hodgson v. Humphries*, 454 F.2d 1279 (10th Cir. 1972) (untimely FLSA suit may be maintained if statute of limitations defense not pled); *Lopez v. Rodriguez*, 668 F.2d 1376, 1378-79 n.4 (D.C. Cir. 1981) (same); *Mumbower v. Callicott*, 526 F.2d 1183, 1187 n.5 (8th Cir. 1975) (same); *Ott v. Midland-Ross Corp.*, 523 F.2d 1367, 1370 (6th Cir. 1975) (Section 255 time limitation is subject to equitable tolling). The decisions below are therefore also in tension with these appellate decisions.

The second case relied on by the GAO, *Kalmich v. Bruno*, 553 F.2d 549 (7th Cir. 1977), is similarly unavailing. *Kalmich*, like *Danzer*, did not hold that every statute of limitations extinguishes liability when the time has run. It recognized that some statutes of limitation limit liability and others limit only remedy. However, the question addressed was quite different than the question here. The plaintiff could only seek redress in court and the issue was whether a general Yugoslavian statute of limitations expressed substantive legislative policy as to liability or was merely a procedural rule under *Erie*. At stake was the ability of a victim of Nazi confiscation to sue the person who took over the factory that was confiscated. A divided panel found the statute providing an unlimited time to sue under a right provided in a different statute to be substantive. *Id.*. at 553. *Kalmich* did not address the question here: whether a

time limit directed solely to judicial actions, enforcing rights established in other statutes, at a time when administrative proceedings were also available to enforce those rights, limits the liability itself.

The GAO's additional policy argument, that the same purposes furthered by the Portal Act would also be furthered by imposing its two-year limit on administrative FLSA claims, *see Ford*, 73 Comp. Gen. at 161, was not expressly adopted by either court. It is, in any event, unavailing because Congress did not make this policy choice -- not when it extended the FLSA to federal employees; not in response to the GAO's decision in 1978 that the Barring Act's six-year time limit applied to administrative FLSA claims; not during the 16 years the GAO consistently applied the six-year limit to these claims; and not in 1982 when Congress actually amended the Barring Act, but took care to explain it intended the law "to remain substantively unchanged." 1982 U.S.C.C.A.N. at 1897 (H.R. Rep. 97-651).[12/]

12/ The choice Congress did make may reflect a recognition that multiple statutes set forth rules for federal employee wages and a preference that the GAO apply the same limitations period, whichever statute is ultimately determined to govern a particular claim. Congress' choice may also have reflected a view that the balance of interests is different when the employer is the United States rather than a private company. For example, Congress may have recognized that the government's ability to borrow capital or undertake new projects is less affected by open-ended obligations than the ability of private companies to do so. Congress may also have believed that the government, even more than private employers, should be held accountable for failing to comply with prevailing law. In any

(continued...)

D. Congress Did Not Alter The Statutory Scheme By Amending Section 640.

The courts' reasoning with respect to the scope of Section 640, as amended, is also unsupportable, and cannot provide a basis for their decisions. The district court expressly, Pet. App. 30a, and the court of appeals by adopting the district court's reasoning, Pet. App. 8a-9a, 10a, held that the correctness of the GAO's decision was moot because Congress had adopted "the two or three-year limitation period . . . for all claims that do not fall under amended Section 640." Pet. App. 30a. Congress, however, enacted no such legislation, and the legislation it did enact cannot be reconciled with that conclusion.

The original Section 640 did not purport to set a prospective rule at all. It provided a limitations period for a defined set of *pending* claims. *See* p. 5, *supra.* Indeed, its sponsor Senator Sarbanes explained when he introduced the legislation that "the underlying question regarding the appropriate length of the statute of limitation for FLSA claims is one of continuing debate." Pet. App. 5a (citing 140 Cong. Rec. S8400 (daily ed. July 1, 1994)). Section 640 was intended solely to stop the GAO from applying its "proposed change" to the long-standing statute of limitations rule to pending claims, *id.*, while the merits of the statutory interpretation questions were resolved in the natural course of litigation.

A year later, when Congress again turned to the question, it did not repeal Section 640, and it did not remove any of the

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12/ (...continued)
event, it is Congress' actions that govern, and Congress has not enacted legislation to shorten the limitations period for administrative FLSA claims to two years.

language in the provision as originally enacted. Instead, Congress amended Section 640 by adding additional language that exempted significant claims from the section's original scope. The amendment did not purport to set a statute of limitations for administrative FLSA claims. It did not amend the Barring Act or the Portal Act. Congress simply withdrew certain FLSA claims from the rule added in the original Section 640. *See* p. 7 n.4, *supra*.

Thus, Congress returned the pending claims covered by the amendment to the *status quo ante* to be governed by the pre-existing statutory scheme, before Section 640 was enacted. And Congress left the pending claims *not* covered by the amendment to be governed by the *six*-year time limit specified in the original Section 640. But Congress did *not* prescribe a two-year limitations period for FLSA claims. The House Subcommittee Chairman, Rep. Lightfoot, appears to have wanted to do that, opining from the House floor that GAO's long-standing interpretation of the Portal Act had been wrong. Pet. App. 7a (citing 141 Cong. Rec. H12376 (daily ed. Nov. 15, 1995)). Legislation consistent with Rep. Lightfoot's view would have included administrative claims under not only the FLSA, but also under the Walsh-Healey and Bacon-Davis Acts, and would have applied not only to claims filed before June 30, 1994, but to administrative claims filed at any time. But the legislation that was drafted and enacted did nothing of the kind. Thus, Rep. Lightfoot's view was not adopted by the conference committee or by either chamber of Congress.

The conclusion reached by the courts below -- that Congress had, by *implication*, set a two-year limitations period for FLSA claims not expressly exempted by Section 640 -- is at odds not only with principles of statutory interpretation but also with the nature of the legislative power. No court had yet

reviewed the GAO's decision. To assume that Congress intended its action to have the effect of precluding judicial review *by implication*, without more, presumes that Congress is woefully unaware of the structure of the federal government, and of its own powers and obligations within that structure. To permit Congress to preclude judicial review under these circumstances -- as the courts below did -- undermines that structure, and provides a precedent with far-reaching and unsettling implications.

III. THIS COURT SHOULD ALSO GRANT CERTIORARI TO ESTABLISH AND ENFORCE THE CONSTITUTIONAL LIMITS ON THE GOVERNMENT'S POWER TO ACT IN DEROGATION OF THE LAW IN PURSUIT OF ITS OWN PECUNIARY INTERESTS.

The GAO's sudden reversal of long-settled law in order to avoid paying legitimate debts, and the decisions below upholding it, are inconsistent with the dictates of due process. The GAO's long-standing interpretation of the Portal Act to apply solely to actions in court for redress under the three statutes covered, and its concomitant application of the Barring Act's six-year statute of limitations to administrative claims under those statutes, was long-settled law and unchallenged before petitioners' victory in the Court of Federal Claims. The GAO's interpretation of the scope of the Portal Act had been consistent since at least 1953, when it first addressed the application of the Portal Act to administrative claims. The GAO's' interpretation was also consistent with the views of the predecessor of the OPM, the Civil Service Commission, *see Transportation Systems Ctr.*, 57 Comp. Gen. at 443, and had been adopted by the OPM in its Federal Personnel Manual Letters. *See* Federal Personnel Manual Letter 551-15 (issued

July 11, 1978); Federal Personnel Manual Letter 551-18 (issued July 1, 1982, and in effect when the GAO heard *Ford*). Moreover, the Department of Labor itself had urged that view to the GAO, *see L. Gary Clemente*, 33 Comp. Gen. at 67, and the Department of Housing and Urban Development had urged that view in court. See *Glenn Electric*, 755 F.2d at 1034 n.7.

Only after the more than 14,000 petitioners, and others, filed administrative FLSA claims, and only after the Court of Federal Claims held thousands of those claims valid, did either the OPM or the GAO suddenly reconsider the statutory interpretation they had promulgated and enforced for more than 40 years, and determine that a different view would protect the government from having to pay for its systematic denial of statutorily-mandated wages to thousands of government employees. *See Ford*, 73 Comp. Gen. at 161. The GAO's lack of genuine investigation into, or interest in, the statutory interpretation questions actually at issue in *Ford* is demonstrated by the GAO's reliance on cases that provide no support for its position, its failure to distinguish or analyze the decisions from this Court and from the courts of appeals squarely conflicting with or in tension with its approach, and its invocation of imagined legislative policy unsupported by legislative action. *Id.* at 160-161; *see* pp. 15-16, 22-27, *supra*.

Indeed, the GAO's real motivation is demonstrated by its complicity in an unwavering pattern of agency activity to avoid responsibility for the government's prior wrongdoing at all costs -- through delay, through *ad hoc* result-driven statutory interpretation, through intense lobbying, and through suspension of FLSA proceedings. The GAO's actions here raise some of the same concerns this Court addressed in *United States v. Winstar Corp.*, 518 U.S. 839 (1996), under different circumstances: the fundamental unfairness of the government

employing its police power to avoid obligations undertaken in its proprietary capacity. The GAO's revised view of the rules governing administrative claims was adopted to rid the government of a substantial obligation by using its delegated position as a neutral arbiter in a decidedly non-neutral manner.

This Court's review is critical, not only because the GAO was wrong as a matter of statutory interpretation, but also because its abuse of its adjudicatory position deprived petitioners, and others, of their property without due process of law.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 5, 1999

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APPENDIX B:

Memorandum, *Adams, et al. v. Hinchman, et al.*, No. 95-2015, United States District Court for the District of Columbia (filed Oct. 10, 1996) 13a-31a

APPENDIX C:

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-5121

STEPHEN S. ADAMS, *et al.*,
Appellants,
v.
JAMES F. HINCHMAN, Acting Comptroller General of the United States General Accounting Office, *et al.*,
Appellees.

Appeal from the United States District Court
for the District of Columbia

Argued March 12, 1998
Decided August 28, 1998

Before: RANDOLPH, ROGERS, and TATEL, Circuit Judges.

PER CURIAM:

This is an appeal from the district court's judgment rejecting the claims of 14,122 current and former federal criminal

investigators or other law enforcement officers. The plaintiffs were employed between 1984 and 1995 in federal agencies such as the Customs Service, the Secret Service, the Internal Revenue Service, the Drug Enforcement Agency and the Bureau of Alcohol, Tobacco and Firearms.[1] Between February 16, 1990, and December 13, 1995, they filed civil actions in the Court of Federal Claims alleging that they had been wrongfully classified as exempt from the overtime provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq*. During the same period, each employee also filed an administrative claim at the Government Accounting Office. Of the 14,122 employees, 11,247 brought suit before June 30, 1994.

In a consolidated case, the Court of Federal Claims held that certain grades of employees—namely, GS-9 and GS-11 investigators at BATF, DEA, IRS, and Secret Service, and GS-9 investigators at Customs Service—were not exempt from FLSA, and thus had been entitled to overtime pay. *Adams v. United States*, 27 Fed. Cl. 5 (1992). On March 16, 1994, these plaintiffs entered into settlement agreements with the United States. The agreements gave the plaintiffs "back pay and interest . . . for the two-year period prior to the date that each such plaintiff filed suit" but did not prejudice their rights to pursue administrative remedies. Counsel then corresponded with the GAO regarding the pending administrative claims.

The authority of the GAO to settle claims against the United

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[1] The original defendants were then Comptroller General of the General Accounting Office Charles A. Bowsher, and the heads of the various federal agencies. On Septembr 30, 1996, Mr. Bowsher retired. The acting Comptroller General, James Hinchman, was substituted as defendant.

States is found in the Barring Act, 31 U.S.C. § 3702.[2] According to the GAO, "to settle a claim means to administratively determine the validity of that claim. . . . Settlement includes the making of both factual and legal determinations. The authority to settle and adjust claims does not, however, include the authority to compromise claims." General Acccounting Office, Principles of Federal Appropriations Law 11-6 (1982); *see also Illinois Surety Co. v. United States ex rel. Peeler*, 240 U.S. 214, 219 (1916). Under 31 U.S.C. § 3702(b)(1)(A), a claim against the government "must be received . . . within six years after the claim accrues except . . . as provided in this chapter or another law."

Lawsuits for back pay under FLSA are subject to the Portal-to-Portal Act's statute of limitations—two years for non-willful violations and three years for willful ones.[3] *See* 29 U.S.C. § 255(a). Shortly after FLSA coverage was extended to federal employees, however, the GAO ruled that "the time limitation for the filing of claims by federal employees under the FLSA which may be considered by our office is six years . . . ." *In re Transportation Sys. Ctr.*, 57 Comp. Gen. 441 (1978). The GAO relied in part on a letter from the Civil

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[2] The GAO's authority to settle federal employees' compensation claims has since been transferred to the Office of Personnel Management. *See* 31 U.S.C.A. § 3702(a)(2) (West Supp. 1998).

[3] One of the purposes of the Portal-to-Portal Act, enacted in response to *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), was to substitute a uniform federal limitations period for the diverse periods provided under state law. *See Carter v. Panama Canal Co.*, 463 F.2d 1289, 1293 (D.C. Cir. 1972).

Service Commission, reasoning that the language of 29 U.S.C. § 255—which spoke exclusively in terms of a "cause of action"—limited it to judicial proceedings and did not apply to administrative claims. *See also* Principles 11-22 ("[T]he time limit for filing a claim under the Fair Labor Standards Act is the six years prescribed by [then-] 31 U.S.C. § 71a, notwithstanding a two-year statute of limitations for commencing actions at law. Thus, a claim filed under the FLSA more than two years but less than six years after it accrued could still be considered administratively, although the claimant would have lost his recourse to the courts.").

In back pay and overtime cases, the statute of limitations determines how many years of compensation each claimant receives. Since these are continuing claims, a separate cause of action accrues each payday. A six-year statute of limitations means that an employee could recover six years of back pay or overtime compensation dating from the time he or she first filed suit.

On May 23, 1994, the GAO overruled *Transportation Systems Center*.[4] In *In re Joseph M. Ford*, 73 Comp. Gen. 157 (1994), the GAO held that the shorter statute of limitations found in the Portal-to-Portal Act would henceforth be applied "in the settlement of pending and future FLSA claims filed with GAO by federal employees." The GAO concluded that 29 U.S.C. § 255 was "another law"—and thus an exception to the six-year limitation period in 31 U.S.C. § 3701(b)(1)(A).

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[4] In doing so, the GAO also overruled *In re Henry G. Tomkowiak*, 67 Comp. Gen. 247 (1988), and *In re Federal Firefighters*, 68 Comp. Gen. 681 (1989), which had applied the six-year statute of limitations.

On July 1, 1994, Senator Sarbanes introduced legislation intended, he said, "to reverse a very destructive ruling by the General Accounting Office to apply a retroactive change in the statute of limitations from 6 years to 2 years for Federal employees to file back pay claims under" FLSA. 140 Cong. Rec. S8400 (July 1, 1994). As enacted on September 30, 1994, § 640 of the Treasury, Postal Service and General Government Appropriations Act of 1995, Pub. L. No. 103-329, 108 Stat. 2383, 2432, provided:

> In the administration of Section 3702 of title 31, United States Code, the Comproller General of the United States shall apply a 6-year stature of limitations to any lcaim of a Federal Employee under the Fair Labor Standards Act of 1938 (29 U.S.C. § 201 *et seq.*) for claims filed before June 30, 1994.

Senator Sarbanes added that while "the underlying question regarding the appropriate length of the statute of limitation for FLSA claims is one of continuing debate . . . under no circumstances should GAO apply the proposed change retroactively." 140 Cong. Rec. S8400.

In what was apparently its first decision after passage of § 640, the GAO applied a six-year statute of limitations to claims filed on May 22, 1989, and pending before it as of June 30, 1994. *See In re Molly D. Kinsley*, 1995 WL 9720 (Jan. 9, 1995). The GAO explained that § 640 "obviates the need for us to discuss the effect, if any, of *Joseph M. Ford* . . . . In light of section 640, the *Ford* holding is applicable only to claims filed on or after June 30, 1994." *Id.* at n.7.

Meanwhile, counsel for the employees again contacted the GAO and requested a meeting to resolve pending claims in

light of § 640. The GAO acknowledged that "the Act of Congress has modified our *Ford* decision" but pointed out that our regulations require that the agency from which the claim originated shall initially adjudicate the claim. *See* 4 C.F.R. § 31.4 (1994)."[5] Counsel then brought their clients' claims to the attention of the employing agencies, each of which responded that § 640 gave specific authority to apply a six-year statute of limitations *only* to the Comptroller General and that the agencies themselves were without statutory authority to do so. Counsel appealed these denials to the GAO, but the GAO did not respond. However, with regard to an unrelated FLSA case, the GAO informed the Personnel Director of the U.S. Customs Service that it did "not intend to issue a decision in *Marvin B. Atkinson* . . . until the Treasury, Postal Service, and General Government Appropriations Bill, 1996 . . . is enacted (because of the possible retroactive repeal of § 640)."

In November 1995, Congress amended § 640 to state:

> This section shall not apply to any claim where the employee has received any compensation for overtime hours worked during the period covered by the claim under any other provision of law, including,

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[5] 4 C.F.R. § 31.4 provides in part:

> A claimant should file his or her claim with the administrative agency or department out of whose activities the claim arose. The agency shall initially adjudicate the claim. If the claimant is not satisfied with the agency's determination, he or she may appeal that determination to the Claims Group, General Accounting Office. Claims which cannot be resolved by the department or agency shall be transmitted to the Claims Group, General Accounting Office, for resolution.

> but not limited to, 5 U.S.C. 5545(c), or to any claim for compensation for time spent commuting between the employee's residence and duty station.

Pub. L. No. 104-52, 109 Stat. 468. Introducing this amendment, Representative Lightfoot said that the GAO, in its 1978 decision, "made a mistake and established regulations stating that Federal employees can get up to 6 years back pay for overtime claims" under the FLSA. The GAO discovered and corrected "its mistake," but then the 103d Congress "reversed GAO, and passed a law allowing Federal workers to get up to 6 years back pay. The problem is that this act will cost as much as $460 million. . . . The conferees were faced with a choice—either pay hundreds of millions for work done many years ago . . . or give the Federal workers the same rights as their private sector counterparts . . . . [W]e included language providing for the same treatment for public and private workers . . . not just because it costs a lot of money, but because it is fair. 141 Cong. Rec. H12376 (Nov. 15, 1995).

After the amendment of § 640, the GAO decided *Atkinson*, a case in which the plaintiffs here had been granted leave to intervene. *In re Marvin B. Atkinson*, 1996 WL 31212 (Jan. 29, 1996). Atkinson's claim had been filed on January 1, 1994, and sought compensation for the time he spent traveling between home and work while driving a government vehicle. Atkinson's employing agency denied his claim after the GAO decided *Ford*; he based his administrative appeal on the original § 640. The GAO held that "the November 19, 1995 amendment to section 640 effectively reestablishes the two-year statute of limitations for any claim where the employee has received overtime pay under any other law or any claim for time spent commuting.

We see no basis for the assertion that this amendment does not apply to Mr. Atkinson's claim." *Id.*

On October 27, 1995—before passage of the amendment to § 640 or the GAO's decision in *Atkinson*—plaintiffs brought this action in district court seeking "mandamus and injunctive and declaratory relief." The complaint challenged *Ford*'s adoption of a shortened, retroactive statute of limitation; the GAO's insistence that plaintiffs bring their claims before their respective agencies; the refusal of those agencies to grant the claims; and the GAO's refusal to pass on their appeals. In Supplemental Complaints dated December 13, 1995, and January 29, 1996, plaintiffs added the amendment to § 640 and the GAO's decision in *Atkinson* to their list of requests for declaratory relief.

Plaintiffs alleged that the GAO's decision in *Ford* and the amendment to § 640 had offended due process. They asserted property interests in their back pay claims before the GAO and in their earned but unpaid compensation.[6] On October 10, 1996, the district court (Judge June L. Green) granted defendants' motion for summary judgment. The court later denied plaintiffs' motion for reconsideration. Our review of a grant of summary judgment is de novo. With one exception, we shall affirm the district court's judgment substantially for the reasons stated in the court's thorough

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[6] On appeal, plaintiffs also maintain that they have a property interest in the statute of limitations itself. Brief for Appellants at 45. They cite no support for the assertion of such an interest and we are aware of none. As explained earlier, the amount of overtime that plaintiffs can claim is limited by the governing statute of limitations. Thus the two are essentially the same and the same analysis applies.

and well-reasoned opinion.[7]

The district court held that the GAO's prior application of a six-year statute of limitations had been an error. *Adams v. Bowsher*, 946 F. Supp. 37, 42 (D.D.C. 1996). It decided that plaintiffs had no property interest in their pending administrative claims because "a cause of action . . . affords no definite or enforceable property right until reduced to a final judgment." *Id.* at 41 (quoting *Austin v. City of Bisbee, Arizona*, 855 F.2d 1429, 1436 (9th Cir. 1988)). *See also Sowell v. American Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir. 1989); *Hammond v. United States*, 786 F.2d 8 (1st Cir. 1986). Without reaching the issue whether enactment of the original § 640 gave certain plaintiffs property rights in their unpaid overtime, we agree with the district court that any such property interest could be extinguished so long as the retroactive economic legislation met the guarantees of due process. *See General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992). Analyzing the legislative history of the amendment to § 640, the district court found that the statute had a "legitimate legislative purpose which was furthered by rational means." 946 F. Supp. at 44 (relying on *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984) and *Usery v. Turner Elkhorn Mining Co.*, 428

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[7] Appellees have moved to strike section III of plaintiff-appellants' reply brief on the ground that it raised issues not advanced in their opening brief. Plaintiffs there contended for the first time that the Back Pay Act, 5 U.S.C. § 5596, and the Civil Service Reform Act, 5 U.S.C. § 7121(a), display congressional intent to treat federal and private sector employees differently. *See* Reply Brief for Appellants at 10-13. It is our practice not to consider any issue "raised for the first time in a reply brief," a point at which the opposing side has no opportunity to respond. *See Rollins Environmental Servs., Inc. v. EPA*, 937 F.2d 649, 652 n. 2 (D.C. Cir. 1991). We grant the motion to strike.

U.S. 1 (1976)). The court emphasized that Representative Lightfoot's statement indicated a desire to promote fairness and to equate "the rights enjoyed by federal employees to those of private sector employees." 946 F. Supp. at 43.

As for plaintiffs' equal protection claim, the district court determined that plaintiffs and the *Kinsley* claimants, whose claims had been subject to a six-year statute of limitations, were not similarly situated. *Id.* at 45. Unlike the claimants in *Kinsley*, plaintiffs did not have a sufficiently developed factual record for their claims to be processed by the GAO prior to the enactment of the amendment. In addition, plaintiffs charged that the GAO violated the Administrative Procedure Act in deciding *Ford* and in failing to handle their cases in a timely fashion—*i.e.*, before § 640 was amended. Such claims were moot, the district court concluded, because Congress "had impliedly adopted the two or three-year limitation period" and the amendment "passe[d] constitutional muster." 946 F. Supp. at 45. Thus the *Ford* and *Atkinson* decisions were valid and it was beyond the power of the court to compel the GAO to apply a longer statute of limitations.

While we therefore are in general agreement with the district court, we cannot affirm the portion of the court's decision holding that plaintiffs' "property" had not been taken without just compensation, in violation of the Fifth Amendment to the Constitution. *See Adams*, 946 F. Supp. at 44. Applying the test for a compensable taking set forth in *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-25 (1986), the district court concluded that any economic impact on individual plaintiffs was slight, that the amended § 640 did not "unduly interfere with a distinct investment-backed expectation," and that "the nature of the action taken

by Congress is not inconsistent with the purpose behind the takings clause." 946 F. Supp. at 44.

Repeating the argument they made below, plaintiffs argue that "deprivation of [their] previously earned FLSA wages constitutes an unlawful taking of [their] labor without just compensation under the Fifth Amendment." Brief for Appellants at 19. We are without jurisdiction to decide this claim. The usual remedy for unconstitutional takings is "a suit for money damage (*i.e.*, the 'just compensation' that the Constitution assures) under the Tucker Act in the Court of Federal Claims, 28 U.S.C. § 1491 . . . ."[8] *Student Loan Marketing Ass'n v. Riley*, 104 F.3d 397, 401 (D.C. Cir. 1997). "Except in cases in which the amount in controversy is less than $10,000, in which event jurisdiction is concurrent with the federal district courts, *see* 29 U.S.C. § 1346(a)(2), the Federal Claims Court's jurisdiction in such actions is exclusive." *Railway Labor Executives' Ass'n v. United States*, 987 F.2d 806, 816 (D.C. Cir. 1993). While there may be certain exceptions "involv[ing] mandates of direct transfers of money to the government," *see Student Loan Marketing Ass'n*, 104 F.3d at 401 (quoting *In re Chateaugay Corp.*, 53 F.3d 478, 493 (2d Cir. 1995)), they are not applicable here. At oral argument, counsel for the plaintiffs represented that each of their individual claims amounted to more than $10,000. If that were true, the district court would

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[8] In relevant part 28 U.S.C. § 1491(a)(1) provides:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

not have had jurisdiction to hear the taking claim in the first place. Even if each back pay claim were less than $10,000 and jurisdiction was based on the "Little Tucker Act" (28 U.S.C. § 1346(a)(2)), the United States Court of Appeals for the Federal Circuit—not us—would have exclusive jurisdiction over the appeal. *See* 28 U.S.C. § 1295(a)(2). Either way then, plaintiffs' taking claim is not properly before us.[9] We therefore remand the takings issue to the district court for a determination of whether jurisdiction was proper under the Little Tucker Act, 28 U.S.C. § 1346(a)(2).

For the reasons stated above, the district court's grant of summary judgment is affirmed in part and reversed and remanded in part.

So ordered.

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[9] After oral argument, the parties called our attention to two recently decided cases—*National Treas. Employees Union & Federal Deposit Ins. Corp.*, 53 F.L.R.A. No. 134 (Feb. 27, 1998); and *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131 (1998) (plurality opinion). Neither decision affects the outcome of this case. *National Treasury Employees Union* appears to support the reasoning of the district court. In *Eastern Enterprises*, four Justices concluded that it was within the district court's power to award equitable relief for a claim arising under the Takings Clause. *See* 118 S. Ct. at 2145 (quoting *In re Chateaugay Corp.*, 53 F.3d at 493). Unlike *Eastern Enterprises*, plaintiffs here are not threatened with a taking by a "challenged statute" that "requires a direct transfer of funds" from them to the government. *See id.* Rather, they seek compensation from the government for unpaid overtime. The only effect of a longer statute of limitations would be to grant plaintiffs more money. Thus the circumstances found to support district court jurisdiction in *Eastern Enterprises* do not exist in this case.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

CIVIL ACTION NO. 95-2015

STEPHEN S. ADAMS, *et al.*,
Plaintiffs,

v.

CHARLES A. BOWSHER, Comptroller General of the United States, *et al.*,
Defendants.

October. 10, 1996

MEMORANDUM

JUNE L. GREEN, District Judge.

Before the Court are Plaintiffs' Motion for Summary Judgment and Defendants' Motion for Judgment on the Pleadings, or, in the Alternative, for Summary Judgment. For the reasons stated hereafter, Plaintiffs' motion is denied and Defendants' motion for Summary Judgment is granted.

I. BACKGROUND

Plaintiffs are current or former employees of the United States, employed by one of several agencies as criminal investigators or in some other law enforcement capacity. Those agencies include the Bureau of Alcohol, Tobacco and Firearms ("BATF"), Drug Enforcement Administration ("DEA"), Internal Revenue Service ("IRS"), Customs Service ("Customs"), and the U.S. Secret Service ("Secret Service").

In February of 1990, Plaintiffs brought actions in the United States Court of Federal Claims ("CFC"), alleging, *inter alia*, that they improperly had been considered exempt from the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA"), and were entitled to compensation for unpaid overtime wages.[10] (Compl. ¶ 16). Identical claims were filed simultaneously with the General Accounting Office (GAO). (Compl. ¶ 20). In a decision dated October 30, 1992, the CFC concluded that some of the Plaintiffs employed by those agencies were exempt from the FLSA's overtime compensation provisions, while others were not exempt. *Adams v. United States*, 27 Fed. Cl. 5 (1992). Thereafter, in March 1994, the United States reached "partial" settlement agreements with those plaintiffs the CFC had determined to have been non-exempt from the FLSA. *See* Bernstein Decl., Exhibits 8-10.

In the wake of the CFC decision, as well as the ensuing settlements, Plaintiffs in this case, on April 12, 1994, attempted to have their previously filed administrative claims

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[10] Those cases have been consolidated in the CFC under the caption *Adams v. United States*, No. 90-162C.

resolved by GAO. Def. Mot. Sum. J., Ex. 4. On May 23, 1994, GAO issued a ruling in a case similar to Plaintiffs', concluding that the two or three-year statute of limitations period contained in the Portal-to-Portal Act, 29 U.S.C. § 255(a), rather than the six-year limitations period contained in the Barring Act, 31 U.S.C. § 3702(b)(1), was applicable to all pending and future FLSA administrative claims, and, therefore, the claim was time barred. *Matter of: Joseph M. Ford*, 1994 WL 201742 (C.G.) (May 23, 1994). This decision reversed the GAO's previous longstanding interpretation that a six-year limitation period applied for filing FLSA claims.[11]

On September 30, 1994, a six-year statute of limitations for FLSA claims filed with GAO was enacted by Congress with the passage of the 1995 Treasury, Postal Service and General Government Appropriations Act, P.L. 103-329, § 640, 108 Stat. 2432 (1994). ("1995 Act.") Section 640 of the 1995 Act ("original Section 640") directed that a six-year statute of limitations be applied for all claims filed prior to June 30, 1994, thereby reversing the GAO's decision in *Ford*. *Id.* Notwithstanding, Plaintiffs' claims before GAO were not resolved. Instead, Plaintiffs were told that their claims must first be filed with the Plaintiffs' employing agencies. Def. Mot. Sum. J., Ex. 7.

As directed, Plaintiffs filed their claims in the form of

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[11] In fact, GAO had been applying the six-year limitations period found in the Barring Act as early as 1978 and at least twice thereafter. *See Transportation Systems Center*, 57 Comp. Gen. 441 (1978); *Federal Firefighters*, 68 Comp. Gen. 681 (1989).

letters to the employing agencies outlining their claims.[12] Def. Mot. Sum. J., Exs. 13, 14.

Between February 15 and May 9, 1995, the agencies denied Plaintiffs' claims on the basis that Section 640 of the 1995 Act authorized only the Comptroller to apply a six-year statute of limitations. Def. Mot. Sum. J., Ex. 5. Plaintiffs appealed these decisions to the GAO. Def. Mot. Sum. J., Ex. 16. The GAO, however, did not act on the appeals immediately, but instead sought comments from the employing agencies. Def. Mot. Sum. J., Ex. 17.

On November 19, 1995, Congress amended Section 640 of the 1995 Act, reaffirming the six-year limitation period for FLSA claims filed prior to June 30, 1994, but making the section inapplicable to employees who had previously "received any compensation for overtime hours worked during the period covered by the claim under any other provision of law . . ." and for time spent driving between home and duty station. Treasury, Postal Service, and General Government Appropriations Act of 1996, Pub. L. 104-52, 109 Stat. 468-69 (1995). ("amended Section 640"). GAO has since applied this statute to deny claims for compensation where an employee was paid for administratively uncontrollable overtime ("AUO") and for time spent driving between the claimant's home and office. *Matter of: Marvin B. Atkinson*, 1996 WL 31212 (C.G.) (January 29, 1996).

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[12] Although only those Plaintiffs who had filed before June 30, 1994, were affected by the 1995 Act, the excluded Plaintiffs continued to argue that they should be extended a six-year limitation period, as well. Def. Mot. Sum. J., Ex. 9 at 2.

II. DISCUSSION

This case presents complex issues of law because it not only requires interpretation of various competing statutes, but raises constitutional questions, as well.

Plaintiffs argue that Section 640 of the 1995 Act, as well as the subsequent amendment to that section, violate due process because they operate retroactively to divest Plaintiffs of already earned overtime pay. The Government asserts that no property rights are implicated and, even if there were, the government acted properly because its purpose in passing the statute was both reasonable and rational.

The analytical framework for this case begins with whether Plaintiffs had a vested property interest at stake, *see Association of Accredited Cosmetology Schools v. Alexander*, 979 F.2d 859, 864 (D.C. Cir. 1992), and, if so, whether the retroactive effect of such economic legislation had a "legitimate legislative purpose furthered by rational means." *General Motors Corp. v. Romein*, 503 U.S. 181, 191, 112 (1992) (*quoting Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984)). An examination of the relevant statutes serves as a starting point.

A. Statute of Limitations Under Fair Labor Standards Act (FLSA)

The Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, which allows claims for unpaid overtime compensation to employees, was made applicable to federal workers by amendment in 1974. 29 U.S.C. § 207(a) (1974). The Statute of Limitations for FLSA claims is found in the Portal-to-Portal Act and allows for a two-year limitations period in

cases where the violation of the FLSA is nonwillful and three years where the violation is willful. 29 U.S.C. § 255(a) (1947). Notwithstanding the provisions of the Portal-to-Portal Act, the GAO, pursuant to its authority to settle administrative claims under the Barring Act, 31 U.S.C. § 3702, traditionally has applied the six-year statute found in that section, to administrative FLSA claims. *See Transportation Systems Center*, 57 Comp. Gen. 441 (1978); *Federal Firefighters*, 68 Comp. Gen. 681 (1989).

As stated previously, this policy changed with GAO's decision in *Ford* when the GAO determined that the two or three-year statute of limitations contained in the Portal-to-Portal Act (which is expressly applicable to the FLSA) trumped the six-year period found in the Barring Act. *Ford* at 4. In so concluding, the GAO relied on the language of the Barring Act, which establishes a six-year limit on filing claims with GAO "except . . . as provided by . . . another law." 31 U.S.C. § 3702(b)(1)(A). The GAO determined "another law" to be the Portal-to-Portal Act and denied the claims on that basis. *Ford* at 4.

Congress, however, extended the two or three-year limitation period to six years by passing Section 640 of the 1995 Act. Although this section effectively reversed the *Ford* decision, it did so only for those Plaintiffs who filed their claims prior to June 30, 1994. Moreover, the amendment to Section 640, enacted a year later, placed further limitations on even these individuals by making the six-year limitation period applicable only to those who had not received overtime compensation under other specified statutes and circumstances or, whose claims involved commuting time. 1996 Act, § 640.

As matters now stand, the Plaintiffs can be divided into two distinct groups for purposes of this analysis: 1) those who filed their claims after the June 30, 1994, date, and, therefore, fall under the 2-3 year limitation period GAO applies to FLSA claims, and 2) those who filed their claims prior to June 30, 1994, but received overtime compensation under other provisions of law or claim overtime for time spent commuting, and are, therefore, excluded from coverage under amended Section 640.

In either instance, the Court, as an initial matter, must decide whether there is a property interest at stake.

B. **Property Interest**

The two alleged property interests advanced here are: 1) pending and accrued administrative backpay claims and 2) earned but unpaid FLSA overtime compensation. Pls'. Mot. Sum. J. at 1, 44. Courts have held that a cause of action, while a "species of property" protected by due process, nonetheless is "inchoate, and affords no definite or enforceable property right until reduced to a final judgment." *Austin v. City of Bisbee, Arizona*, 855 F.2d 1429, 1435 (9th Cir. 1988), *citing In re Consolidated U.S. Atmospheric Testing Litigation*, 820 F.2d 982 (9th Cir. 1987). In the *Austin* case, the Plaintiff was a police officer who had filed his FLSA claim in court. Before the court ruled, however, Congress passed retroactive legislation that effectively extinguished the Plaintiff's claim. The appellate court concluded that the Plaintiff had failed to perfect his rights prior to the change in the law, and, therefore, had no property interest in the cause of action. *Id.* at 1435. Here, of course, there is no final judgment involving the Plaintiffs' claims and so, the Court reaches a similar conclusion.

With regard to Plaintiffs' alleged property interest in their "earned but unpaid FLSA overtime compensation," the Court views this as a much closer question. "Property rights to public benefits are defined by the statutes or customs that create the benefits." *Jones v. Reagan*, 748 F.2d 1331, 1338 (9th Cir. 1984) *citing Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The court in *Austin* dealt with this issue contritely by relying on the decision in *Jones* which stated: "When . . . the statute authorizing the benefits is amended or repealed, the property right disappears." *Id.* Although the outcome essentially is correct, the Court is not inclined to agree with the reasoning in *Jones*.

Prior to FLSA being made applicable to federal workers, there was no expectation of overtime compensation under FLSA and, therefore, no due process property interest. Once added to the FLSA, however, federal workers could thereafter expect to receive overtime compensation treatment under FLSA. While this arguably created a property interest, such a conclusion, without looking further, misses the point that the FLSA is a creature of statute and can only confer benefits contained within the statute. The expectation to overtime compensation, therefore, is governed by the provisions of the FLSA and any other applicable statutory provisions. The question then becomes, exactly what rights did the FLSA and relevant statutes confer on the Plaintiffs, *e.g.*, what is the applicable statute of limitations period for the Plaintiffs?

It is at this juncture of the analysis that the posture of the two groups of Plaintiffs becomes important. For the Plaintiffs who filed their claims after June 30, 1994, or are otherwise excluded under amended Section 640, the question is whether they should have been given the two or three-year

limitation period under the Portal-to-Portal Act, or the six-year period under the Barring Act.

Plaintiffs claim that the Barring Act refers to administrative claims while the Portal-to-Portal Act refers only to "causes of action" filed in court. The Court finds no support for such a position. The Court agrees with the reasoning in *Hickman v. United States*, 10 Cl. Ct. 550, 552 (1986), in which the CFC concluded that Congress acted deliberately in setting the limitation period at two or three years and that there was nothing in the legislative record indicating congressional intent to impart a more liberal limitations period to federal employees than to employees in the private sector. Accordingly, this Court cannot construct a statutory interpretation contrary to congressional intent. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

The Court is aware that for many years the GAO applied a six-year statute of limitations to FLSA claims filed administratively. The simple fact is that GAO was wrong to do so. Until the passage of Section 640 in the 1995 Act, GAO had no authority to permit a 6 year limitation period for FLSA claims. Moreover, GAO's error cannot impart an expectation sufficient to create a property interest. As the Defendants correctly point out, GAO is granted its authority by Congress and is subject to any limitations Congress may impose. *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) ("The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes."). Here, that limitation was a two or three-year limitation period for FLSA claims.

The Court concludes, therefore, that Plaintiffs who are not included under the amended Section 640 (because their claims were filed after June 30, 1994) have no property interest in back pay claims or unpaid overtime compensation.

The remaining Plaintiffs are a different matter. When Congress extended the statute of limitations for FLSA claims to six years by passage of the original Section 640 of the 1995 Act, Plaintiffs suddenly acquired property interests in their unpaid overtime compensation. Although amended Section 640 excludes many of those who otherwise would have fallen within the original Section 640, the Court does not find that these Plaintiffs automatically lose their property interests. The Court disagrees with the reasoning in *Jones* and *Austin* that Congress may extinguish an otherwise vested property interest concerning agency action merely by passing new legislation. This distinction, however, is academic in light of Congress's authority to deny Plaintiffs their property under a different standard.

C. **Economic Legislation and Due Process**

The Supreme Court has held that retroactive economic legislation is permissible even if it interferes with legitimate expectations as long as it meets due process guarantees. *Pension Benefit Guaranty Corporation v. R.A. Gray and Co.*, 467 U.S. 717, 730 (1984). In order for due process to be satisfied, economic legislation, applied retroactively, must have "a legitimate legislative purpose furthered by rational means." *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992). In fact, such legislation is given a presumption of constitutionality and the burden rests on the party challenging the statute to show that it was "arbitrary and irrational." *Usery v. Turner Elkhorn*, 428 U.S.

1, 15 (1976).

There is no question that the legislation involved is economic in nature. Amended Section 640 involves the limitations period for money claims made under FLSA. *See Austin v. City of Bisbee*, 855 F.2d at 1435 ("The FLSA is one of myriad 'legislative Acts adjusting the burdens and benefits of economic life.'" (internal citations omitted)). Further, by its express language, amended Section 640 is retroactive because it applies to individuals who filed their claims prior to June 30, 1994. Moreover, the statute takes away property rights conferred by the original Section 640 by excluding individuals if they have received overtime compensation under different provisions or if their claims involve overtime for commuting.

The question then becomes whether the purpose of the act was legitimate. In determining the legislative purpose, the Court looks both to the legislative history and the language of the statute for guidance.

The legislative record for amended Section 640 is sparse. In fact, there appears to have been little debate on the matter when it came up for a vote on the floor of the House of Representatives on November 15, 1995. What little debate there was took the form of a statement made by Representative Lightfoot in which he indicated that the bill had bipartisan support. 141 Cong. Rec. H12371-02, H12376 (Nov. 15, 1995). Rep. Lightfoot urged passage of the bill on the basis that the government would otherwise be required to pay out an unanticipatedly large sum of money and that government workers should be given the same rights as their private sector counterparts. *Id.* Rep. Lightfoot concluded by stating: "We agreed, not just because it costs a lot of money, but because it is fair." *Id.*

Were the purpose of this statute merely about saving money, the Court would find the legitimacy element to be a more difficult question. As the record shows, however, avoiding a large expenditure is only one of the several stated purposes behind Amended Section 640. More telling is the legislature's stated intention to put federal workers in the same position as private sector workers—a position consistent with the 1974 legislation which made FLSA applicable to federal workers.

Complicating this analysis, however, is the final language of Amended Section 640, which provides:

> This section shall not apply to any claim where the employee has received any compensation for overtime hours worked during the period covered by the claim under any other provision of law, including, but not limited to, 5 U.S.C. 5545(c), or to any claim for compensation for time spent commuting between the employee's residence and duty station.

109 Stat. 468-69. If the intention was to equate the rights of federal workers with the private sector, then why did Congress leave the six-year limitation period relatively intact for some employees? Such language seemingly creates a contradiction between one of the purposes for the legislation, and the final language of Amended Section 640.

The Court, however, is only slightly concerned about such a discrepancy. Perhaps Congress, wanting to be "fair" to many who had already filed their claims, let stand the six-year limitation period for those whose claims had been filed prior to June 30, 1994. After all, future claims would be

given only the two or three-year limitation period in the Portal-to-Portal Act, which is consistent with the rights afforded to the private sector. What Congress changed in the Amended Section 640 was who (of those who filed prior to June 30, 1994) could take advantage of the extended limitation period. While deciding to allow the six-year limitation period to remain temporarily, Congress apparently decided to limit such claims to those workers who had not received overtime compensation for the same period under another provision of law and to exclude any claims involving time spent commuting. There is nothing improper about this. In fact, with regard to the first limitation, it is difficult to imagine any purpose more legitimate than preventing workers from receiving double overtime compensation.

As for the limitation concerning commuting, this is a closer question, especially because there is nothing specific in the legislative history that might offer guidance. Nonetheless, consistent with the reasoning thus far, the Court finds the purpose of this provision to be legitimate. As already noted, Rep. Lightfoot gave as reasons for passage of the amendment "cost" and "fairness". But Rep. Lightfoot also spoke of equating the rights enjoyed by federal employees to those of private sector employees. Under 29 U.S.C. § 254(a) and (b) (1947), employers are not generally liable for overtime compensation for commuting absent a contract or custom. This provision has been extended to include federal workers, as well. *Carter v. Panama Canal Co.*, 463 F.2d 1289 (D.C. Cir. 1972), *cert. denied* 409 U.S. 1012. In any event, private sector employees are limited by the two or three-year statute of limitations for such actions, as would be the Plaintiffs here were it not for the original Section 640. 29 U.S.C. § 255 (1947). To the extent that Congress acted to equate federal workers' rights with those

of the private sector concerning overtime claims for commuting, the Court finds amended Section 640 to have a legitimate purpose. Further, the rational means was to enact amended Section 640.

Accordingly, the Court concludes that Congress, by enacting amended Section 640, had a legitimate purpose which was furthered by a rational means.

D. **Taking Without Compensation**

Plaintiffs also argue that their unpaid FLSA overtime was property that was taken without just compensation in violation of the Fifth Amendment of the Constitution. The Court disagrees.

The test for determining whether a compensable taking has occurred is set forth in *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224-25 (1986), in which the Supreme Court identified the following three factors: 1) the economic impact of the regulation on the claimant, 2) the extent to which the regulation has interfered with distinct investment-backed expectations, and 3) the character of the governmental action.

Concerning the first factor, the Court does not find that Plaintiffs will suffer a great economic impact. It is true that the total payout for Plaintiffs' claims would run into the millions of dollars and some of the claims go back as far as twelve years. This case, however, is not a class action. The "millions of dollars" figure does not, therefore, inure to the group as a whole. Rather, any impact must be measured against the individual claims. Plaintiffs have failed to show how any one of the Plaintiffs would suffer a greater economic

impact than merely losing an entitlement that only in recent years had been discovered. Moreover, insofar as amended Section 640 prevents the Plaintiffs from receiving overtime compensation under FLSA when such compensation was paid under another provision of law, there can be little, if any, economic impact to the Plaintiffs.

Similarly, under the second prong, amended Section 640 does not unduly interfere with a distinct investment-backed expectation. Although the hours worked by the Plaintiffs are tantamount to an investment, there was no legitimate expectation to a six year limitation period. As recounted previously, the proper limitation period for FLSA claims is two or three years as stated by the Portal-to-Portal Act. 29 U.S.C. § 255(a) (1947). While Congress extended the limitation period for some individuals in some instances, it could also limit the application of this extension and did so. Plaintiffs' only legitimate expectation was to a two or three-year limitation period.

The final factor concerns the character of the action. The Court finds that this factor, for the most part, is subsumed by the above discussion concerning due process and the legitimacy of Congress's purpose in passing amended Section 640. As the Supreme Court stated in *Connolly*: "The purpose of forbidding uncompensated takings of private property for public use is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. at 227, *quoting Armstrong v. United States*, 364 U.S. 40, 49 (1960). Congress apparently decided that it was unfair for the public to bear the burden of a mistake made by GAO. The legislative history of amended Section 640 expressly

mentions fairness as a reason for the legislation. 141 Cong. Rec. H12371-02, H12376 (Nov. 15, 1995). Accordingly, the Court finds that the nature of the action taken by Congress is not inconsistent with the purpose behind the takings clause.

E. **Equal Protection**

Plaintiffs also argue that they were denied equal protection of the laws guaranteed by the Fifth Amendment to the Constitution. Essentially, Plaintiffs allege that in the intervening time between the passage of the original Section 640 and the amended Section 640, several claimants had their claims favorably processed ("Kinsey claimants"), while Plaintiffs' claims were not acted upon during that same period.

The equal protection clause is meant to protect persons similarly situated from receiving disparate treatment under applicable laws. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). Where such disparate treatment does occur, there must be a rational basis. *Heller v. Doe*, 509 U.S. 312, 318 (1993). Here, the Court does not reach the rational basis question because the Court concludes that Plaintiffs and the Kinsley claimants were not similarly situated.

Although the Kinsley claimants and the Plaintiffs each had claims that were received by GAO during the interim period between passage of the original section 640 and the amended Section 640, they arrived in very different stages of development. The Kinsley claimants had received rulings on their claims by the Office of Personnel Management (OPM) in 1993, which included a fully developed record of factual findings. *Kinsley*, No. B-

235609.2, 1995 WL 9720, 2 (Comp. Gen. Jan. 9, 1995). Plaintiffs, however, had not received administrative rulings on their claims when they first approached GAO following enactment of the original Section 640 and there does not appear to have been a factual record upon which GAO could even have reviewed the claims. While the Plaintiffs, as directed, brought their claims to the employing agencies, the claims for the Kinsley claimants were resolved pursuant to the newly enacted original Section 640 in January 1995. *Id.* By the time Plaintiffs received decisions from the individual agencies (March 10 through May 12, 1995), however, the Treasury Department was already lobbying Congress to repeal original Section 640. (Bernstein Decl., Exs. 11, 12).

Whether such activity is a proper reason to delay resolution of pending claims is a difficult question, but one the Court does not have to answer. Rather, the Court is satisfied that Plaintiffs did not have a sufficiently developed factual record for their claims and, given the sheer number of Plaintiffs in this case, would not have had one by the time amended Section 640 was enacted in November 1995.[13] The Court, therefore, concludes that Plaintiffs were not denied equal protection of the laws because they were not similarly situated with those whom Plaintiffs complain were given preferential treatment.

F. **Administrative Procedures Act ("APA")**

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[13] Defendants argue that because of the number of claimants and the enormity of the task of determining their substantive eligibility for backpay, any final decision was months, if not years, away. Def. Mot. Sum. J. at 46.

In light of the Court's conclusions thus far, Plaintiffs' remaining claims are moot. Plaintiffs allege that the GAO and the employing agencies violated the APA by following the *Ford* decision and again when the GAO failed to resolve Plaintiffs' claims in the interim period between passage of original Section 640 and amended Section 640. Plaintiffs request that the Court declare the *Ford* decision invalid and order the GAO to apply a six-year statute of limitations to all of their claims.

Plaintiffs' claims in this regard depend upon the argued invalidity of amended Section 640. The Court has determined that amended Section 640 passes constitutional muster. Moreover, insofar as Congress impliedly adopted the two or three-year limitation period (and which this Court finds otherwise to be applicable) for all claims that do not fall under amended Section 640, the *Ford* and the *Atkinson* decisions are valid. Finally, the Court cannot in this case "compel agency action unlawfully withheld or unreasonably delayed" under the APA, 5 U.S.C. § 706(1), because the delay complained of has been mooted by enactment of amended Section 640.[14]

III. CONCLUSION

For the reasons stated above, the Court concludes that Congress did not act unconstitutionally by enacting amended Section 640, nor did the GAO violate equal protection guarantees in processing other claims. Finally, in light of

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[14] Of course, the Court expects that those Plaintiffs who meet the criteria of amended Section 640 will have their claims resolved in a timely fashion.

these conclusions, Plaintiffs' remaining claims pursuant to the APA are moot. Judgment, therefore, is entered for the Defendants.

An appropriate Order accompanies this Memorandum.

/s/ June L. Green
JUNE L. GREEN
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 97-5121

September Term, 1998
95cv02015

Stephen S. Adams, et al.,
Appellants

v.

James F. Hinchman, Acting Comptroller General of the United States General Accounting Office, et al.
Appellees

BEFORE: Randolph, Rogers and Tatel, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed October 9, 1998, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 97-5121

September Term, 1998
95cv02025

Stephen S. Adams, et al.,
Appellants

v.

James F. Hinchman, Acting Comptroller General of the United States General Accounting Office, et al.
Appellees

BEFORE: Randolph, Rogers and Tatel, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed October 9, 1998, it is

ORDERED that the petition be denied. See Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016-20 (1984).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY:
Robert A. Bonner
Deputy Clerk

Supreme Court, U.S.
FILED
MAY 4 1999
OFFICE OF THE CLERK

(2)

No. 98-1265

In the Supreme Court of the United States

STEPHEN S. ADAMS, ET AL.,
PETITIONERS

v.

JAMES F. HINCHMAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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2988

QUESTIONS PRESENTED

1. Whether Congress has unequivocally expressed an intent to waive the sovereign immunity of the United States to liability under the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*, for back pay covering a six-year period before any claim is filed, even though similarly situated private employers would be subject to liability only for a two-to-three-year period.

2. Whether the manner in which petitioners' administrative claims were handled violated due process.

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In the Supreme Court of the United States

No. 98-1265

STEPHEN S. ADAMS, ET AL.,
PETITIONERS

v.

JAMES F. HINCHMAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 154 F.3d 420. The opinion of the district court (Pet. App. 13a-31a) is reported at 946 F. Supp. 37.

JURISDICTION

The judgment of the court of appeals was entered on August 28, 1998. Petitions for rehearing were denied on November 9, 1998. The petition for a writ of certiorari was filed on February 5, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Subject to certain occupational and other exemptions, the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, entitles employees to overtime pay

(usually based on hours worked in excess of a 40-hour work week) at the rate of one and one-half times an employee's normal hourly compensation. 29 U.S.C. 207(a), 213(a)(1). Employees may bring suit for unpaid FLSA overtime compensation in "any Federal or State court of competent jurisdiction." 29 U.S.C. 216(b). In the Portal-to-Portal Act of 1947, 29 U.S.C. 251 *et seq.*, Congress added the following statute of limitations to the FLSA:

> Any action commenced * * * to enforce any cause of action for * * * unpaid overtime compensation * * * under the Fair Labor Standards Act * * *
>
> > (a) * * * may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.

29 U.S.C. 255(a). One of Congress's declared purposes in enacting that provision was to substitute this uniform federal limitations period for "the varying and extended periods of time for which * * * potential retroactive liability" under the FLSA had been imposed upon employers under state law. 29 U.S.C. 251(a).

When the FLSA and the Portal-to-Portal Act were enacted, federal employees were expressly excluded from the FLSA's coverage. See *Carter* v. *Panama Canal Co.*, 463 F.2d 1289, 1294 & n.10 (D.C. Cir.), cert. denied, 409 U.S. 1012 (1972). Amendments in 1966 brought limited classes of federal employees within the FLSA, which continued to exclude all other federal

employees. *Id.* at 1294-1295. In 1974, the FLSA was amended to cover federal employees generally, subject to the statute's general exemptions (*e.g.*, 29 U.S.C. 213 (1994 & Supp. III 1997)) for executive, administrative, and professional employees, among others. Pub. L. No. 93-259, 88 Stat. 55 (codified in relevant part at 29 U.S.C. 203(e)(2)(A)). Each time federal employees were brought within the FLSA, Congress's purpose was to achieve comparable treatment with private sector employees already covered by the Act. See *AFGE* v. *OPM*, 821 F.2d 761, 769 (D.C. Cir. 1987); *Carter*, 463 F.2d at 1298-1299; H.R. Rep. No. 913, 93d Cong., 2d Sess. 28 (1974). Congress expressed no intention to provide federal employees with greater protections under the FLSA than those provided to other employees. See *Hickman* v. *United States*, 10 Cl. Ct. 550, 552 (1986).[1]

In addition to their judicial remedies, federal employees may invoke the general administrative claims settlement process provided under the Barring Act, 31 U.S.C. 3702 (1994 & Supp. III 1997).[2] The Barring Act applies to a wide range of money claims against the United States, and, when the claims at issue here were filed, authorized the Comptroller General to settle claims "received * * * within 6 years after the claim accrues except * * * as provided in this chapter or

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[1] Apart from the FLSA, Title 5 of the United States Code independently provides for overtime pay for many federal employees. See, *e.g.*, 5 U.S.C. 5542 *et seq.* Many, if not all, of petitioners here received some type of Title 5 overtime pay during the period relevant to this action.

[2] As used in Section 3702, the term "settlement" denotes not a compromise, but an "administrative determination of the amount due." *Illinois Surety Co.* v. *United States*, 240 U.S. 214, 219-222 (1916).

another law." 31 U.S.C. 3702(b)(1)(A).[3] The Barring Act administrative claims settlement process is optional and non-binding on the claimant; a claimant is not required to exhaust the administrative process before seeking judicial enforcement, and filing an administrative claim does not toll the time for bringing suit. See *Hickman* v. *United States*, 10 Cl. Ct. at 553; see also *Irvin Indus. Canada, Ltd.* v. *United States Air Force*, 924 F.2d 1068, 1077 n.88 (D.C. Cir. 1990); *Burich* v. *United States*, 366 F.2d 984, 986-987 (Ct. Cl. 1966) (citing cases), cert. denied, 389 U.S. 885 (1967). Because they are not pursuing claims against the government, *non*-federal employees may not, of course, invoke the Barring Act's administrative process.

2. a. Petitioners are 14,122 current and former federal criminal investigators or other federal law enforcement officers who seek back overtime compensation under the FLSA for periods between 1984 and 1995. Pet. App. 1a-2a. In suits filed between February 1990 and December 1995 in the Court of Federal Claims (CFC), petitioners claimed that their employing agencies had incorrectly classified their positions as exempt from the overtime provisions of the FLSA, and they

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[3] See also 4 C.F.R. 31.5(a). During much of the period at issue in this suit, the General Accounting Office (GAO), led by the Comptroller General, exercised authority under 31 U.S.C. 3702 to "settle" a wide variety of money claims against the United States. That authority was recently reassigned to various Executive Branch agencies. The Office of Personnel Management (OPM) is now the designated agency for administrative settlement of federal employees' compensation claims. See 31 U.S.C. 3702(a)(2) (Supp. III 1997). Because GAO was the relevant Section 3702 agency during most of this litigation, for convenience we will continue to refer to GAO as the claims processing agency unless otherwise significant.

sought back payment of amounts due. Simultaneously with filing suit in the CFC, each petitioner lodged an administrative claim for back FLSA overtime pay with the GAO under the Barring Act. *Id.* at 2a.

In October 1992, the CFC issued a consolidated partial summary judgment holding that certain grades of employees were not exempt from the FLSA and had therefore been entitled to overtime pay. *Adams* v. *United States*, 27 Fed. Cl. 5 (1992), modified on other grounds, No. 98-5011, 1998 WL 804552 (Fed. Cir. Sept. 23, 1998). In March 1994, petitioners entered into settlement agreements with the United States that gave those employees back overtime pay and interest for the two-year period before the date that each such employee had filed suit, without prejudice to their right to pursue administrative remedies.[4] Pet. App. 1a-2a. Returning to GAO, petitioners sought a total of six years back FLSA overtime pay—four years beyond what they obtained in the CFC settlement, and four years beyond what the FLSA itself provides, see 29 U.S.C. 255(a)—through the administrative claims settlement process. Pet. App. 2a-4a.

b. When GAO had first confronted the question in 1978, it had concluded that the six-year period set forth in the Barring Act, 31 U.S.C. 3702(b)(1)(A), applied to administrative proceedings to recover back overtime pay under the FLSA. *In re Transportation Sys. Ctr.*, 57 Comp. Gen. 441 (1978). By the time petitioners' administrative claims were pending, however, GAO had begun actively reconsidering that ruling. In *In re*

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[4] That arrangement included employees who were not yet *Adams* plaintiffs in the CFC but would become eligible for inclusion within the settlement agreements upon becoming plaintiffs within one year. See C.A. App. 191-192.

Joseph M. Ford, 73 Comp. Gen. 157 (1994), GAO overruled *Transportation Systems* and determined that the relevant limitations period is the one set forth in the FLSA itself, as amended by the Portal-to-Portal Act. GAO reasoned that "[w]hen a statute creates a right that did not exist at common law and restricts the time to enforce it, expiration of the time limit not only bars the remedy but extinguishes the underlying rights and liabilities of the parties." 73 Comp. Gen. at 160-161 (citing *William Danzer & Co.* v. *Gulf & Ship Island R.R.*, 268 U.S. 633, 635-637 (1925)). Thus, GAO concluded, "a time limitation imposed on a statutorily created judicial cause of action will apply to administrative proceedings to adjudicate the same claims absent a specific provision to the contrary. * * * [L]egislative determinations to limit the extent of a party's exposure to liability or to discourage claims involving stale facts or documentation problems are no less relevant to administrative than to judicial proceedings." 73 Comp. Gen. at 161.[5]

Moreover, GAO explained, when Congress extended FLSA coverage to federal employees, "'no congressional intent was manifested in the amending language or its underlying legislative history that federal employees would be accorded a more liberal limitations

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[5] GAO drew support for that position from a 1974 statute that had reduced the Barring Act's limitation period from ten years to six years. See 73 Comp. Gen. at 161. That 1974 amendment, GAO observed, conformed the Barring Act "to the 6-year limitation period applicable to judicial actions on claims against the United States under 28 U.S.C. 2401 and 2501," and its legislative history "noted that '[t]his will make the time limitation consistent with the Statute of Limitations now applicable to claims filed in administrative agencies and the courts.'" 73 Comp. Gen. at 161 (quoting S. Rep. No. 1314, 93d Cong., 2d Sess. 5-6 (1974)).

period than employees in the private sector.'" 73 Comp. Gen. at 160 (quoting *Hickman* v. *United States*, 10 Cl. Ct. at 552). Application of the Barring Act to extend the limitations period for administrative back pay claims against the government, GAO concluded, would thwart congressional intent by "creat[ing] disparate treatment * * * between federal employees and private sector employees," who have no administrative alternative to filing a court suit for back pay. 73 Comp. Gen. at 161. Following its "usual practice," GAO announced that it would apply its policy "to all FLSA claims that have not been settled prior to the date of today's decision." *Ibid.*

c. Petitioners and others quickly persuaded Congress to grant relief from the effect of the *Ford* decision on many already-pending FLSA administrative claims. In Section 640 of the Treasury, Postal Service and General Government Appropriations Act of 1995, enacted September 30, 1994, Congress provided:

> In the administration of section 3702 of title 31, United States Code, the Comptroller General of the United States shall apply a 6-year statute of limitations to any claim of a Federal employee under the Fair Labor Standards Act of 1938 (29 U.S.C. 201 *et seq.*) for claims filed before June 30, 1994.

Pub. L. No. 103-329, 108 Stat. 2432.

Invoking Section 640, petitioners contacted GAO seeking resolution of their claims. GAO acknowledged that Section 640 modified the effect of *Ford*, but it reminded petitioners that, in accordance with GAO regulations, their claims had to be processed first through each claimant's employing agency. Pet. App.

5a-6a; see 4 C.F.R. 31.4.[6] Petitioners brought their claims to the attention of the employing agencies, which denied them on the ground that Section 640 by its terms authorized only the Comptroller General to apply a six-year statute of limitations. Pet. App. 5a-6a.

In 1995, petitioners appealed those agency determinations to GAO. By then, however, Congress was considering repeal of Section 640. GAO announced in a separate pending FLSA administrative case (in which petitioners had been granted leave to intervene) that it did "not intend to issue a decision" concerning application of Section 640 "until the [1996 Treasury Appropriations bill] is enacted (because of the possible retroactive repeal of §640)." Pet. App. 6a (discussing proceedings underlying *In re Marvin B. Atkinson*, No. B-256938.2, 1996 WL 31212 (Comp. Gen. Jan. 29, 1996)); see also C.A. App. 95, 96. GAO transmitted a similar message to Congress. C.A. App. 227, 228. Petitioners filed this lawsuit on October 27, 1995, seeking mandamus, injunctive and declaratory relief requiring GAO to apply a six-year statute of limitations to their claims notwithstanding *Ford*. Pet. App. 8a.

On November 19, 1995, Congress added the following amendment to Section 640:

> This section [*i.e.*, Section 640] shall not apply to any claim where the employee has received any com-

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[6] The relevant regulation provided that "[a] claimant should file his or her claim with the administrative department or agency out of whose activities the claim arose," which "shall initially adjudicate the claim"; and, if unsatisfied, the claimant "may appeal that determination to" GAO. 4 C.F.R. 31.4; see also 4 C.F.R. 31.7 ("Claims are settled on the basis of the facts as established by the Government agency concerned and by evidence submitted by the claimant. * * * The burden is on claimants to establish the liability of the United States, and the claimant's right to payment.").

> pensation for overtime hours worked during the period covered by the claim under any other provision of law, including, but not limited to, 5 U.S.C. 5545(c), or to any claim for compensation for time spent commuting between the employee's residence and duty station.

Treasury, Postal Service, and General Government Appropriations Act of 1996, Pub. L. No. 104-52, 109 Stat. 468-469. That amendment substantially reduces the number of claimants who could rely on Section 640 to support pending claims that would otherwise be foreclosed by the *Ford* decision. In discussing the purpose of the amendment, its sponsor explained that GAO's 1978 decision to apply a six-year limitations period had been "incorrect [because] the law states that everyone would only be entitled to 2 years" back pay for FLSA violations. 141 Cong. Rec. H12,376 (daily ed. Nov. 15, 1995) (remarks of Rep. Lightfoot). He added that, although in *Ford* GAO had "corrected its mistake," the 1994 legislation—which required GAO to allow up to six years back pay for claims that had already been filed by June 30, 1994—would cost the government as much as $460 million, "nearly the entire Secret Service budget." *Ibid.* "The conferees were faced with a choice—either pay hundreds of millions for work done many years ago and fire four or five thousand employees[,] or give the Federal workers the same rights as their private sector counterparts." *Ibid.* Therefore, "we included language providing for the same treatment for public and private workers * * * not just because [to do otherwise] costs a lot of money, but because it is fair." *Ibid.*

GAO applied amended Section 640 in the pending case in which petitioners had intervened. *In re Marvin*

B. Atkinson, No. B-256938.2, 1996 WL 31212 (Comp. Gen. Jan. 29, 1996). GAO then advised petitioners in March 1996 that it would similarly adjudicate their FLSA claims in accordance with amended Section 640. See Pet. App. 16a.

3. Meanwhile, petitioners' lawsuits were pending in the district court, and, in supplemental complaints filed on December 13, 1995 and January 29, 1996, petitioners added challenges to amended Section 640 and *Atkinson*. Petitioners demanded relief based on asserted property interests in their unpaid overtime compensation and in their pending administrative claims. They contended that due process had been violated by the alleged retroactive shortening of their limitations period; by GAO's requirement that they bring their claims initially before their employing agencies; by the refusal of those agencies to determine their claims in accordance with the original Section 640; and by GAO's failure to pass on their appeals before the amendment to Section 640. See Pet. App. 8a. Petitioners also sought relief under the Administrative Procedure Act (APA), 5 U.S.C. 706(1), and further claimed a denial of equal protection on the ground that GAO had processed the claims of an unrelated group of federal employees under Section 640's six-year statute of limitations before the 1995 amendment was enacted. See Pet. App. 28a-30a.

a. The district court granted the government's motion for summary judgment. Pet. App. 13a-31a. The court held that petitioners' pending administrative claims did not constitute separate "property" rights entitling them to demand application of the pre-*Ford* interpretation of the law, because a cause of action is "inchoate, and affords no definite or enforceable property right until reduced to a final judgment." *Id.* at 19a (quoting *Austin* v. *City of Bisbee*, 855 F.2d 1429,

1435 (9th Cir. 1988)). The court also held that petitioners had no enforceable property interest in their "earned but unpaid FLSA overtime compensation." *Id.* at 19a-22a. "[T]he FLSA," it explained, "is a creature of statute and can only confer benefits contained within the statute," *id.* at 20a, and "there was nothing in the legislative record [of the FLSA] indicating congressional intent to impart a more liberal limitations period to federal employees than to employees in the private sector." *Id.* at 21a. Indeed, "[u]ntil the passage of Section 640 in the 1995 Act, GAO had no authority to permit a 6 year limitation period for FLSA claims," and its past practice of doing so was simply "wrong." *Ibid.*

The court added, however, that those petitioners who had filed their administrative claims before June 30, 1994 had derived "property interests in their unpaid overtime compensation" from the enactment of Section 640. Pet. App. 22a. The court concluded, however, that those petitioners are not entitled to relief, because such interests could be extinguished consistently with due process by economic legislation having "'a legitimate legislative purpose furthered by rational means.'" *Id.* at 22a-23a (quoting *General Motors Corp.* v. *Romein*, 503 U.S. 181, 191 (1992)). The court found that the amendment to Section 640 met that standard. *Id.* at 23a-26a.

For similar reasons, the court held that petitioners had identified no unconstitutional "taking" that could justify the injunctive relief they sought. Pet. App. 26a-28a. Applying the analysis of *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-225 (1986), the district court found, among other things, that the denial of petitioners' administrative claims had caused no undue interference with any legitimate expectations. Pet. App. 26a-27a. The court further held that, in

amending Section 640 in 1995, Congress had reasonably determined that it would be "unfair for the public to bear the burden of a mistake made by GAO." *Id.* at 27a-28a. Finally, the court rejected petitioners' equal protection and APA claims. *Id.* at 28a-30a.

b. With one exception, the court of appeals affirmed the district court's holdings "substantially for the reasons stated in the court's thorough and well-reasoned opinion." Pet. App. 8a-9a. The exception concerned the district court's disposition of petitioners' claim that the amendment to Section 640 gave rise to a compensable "taking" of rights conferred under the original Section 640. The court of appeals held that it lacked jurisdiction to consider that claim. It explained that "[t]he usual remedy for unconstitutional takings is a suit for money damage (*i.e.*, the 'just compensation' that the Constitution assures)" either in the CFC under the Tucker Act, 28 U.S.C. 1491 (1994 & Supp. III 1997), or, if the amount in controversy is less than $10,000, in the district court under the Little Tucker Act, 28 U.S.C. 1346(a)(2). Pet. App. 11a (citations and footnote omitted). The court found that, if petitioners' counsel were correct in representing that petitioners' individual FLSA back pay claims each exceeded $10,000, the district court would have lacked jurisdiction to consider whether the administrative denial of those claims amounted to a compensable "taking." *Id.* at 11a-12a. In any event, the court added, even if some of those claims were under $10,000, exclusive appellate jurisdiction would lie in the Federal Circuit. *Id.* at 12a. The court thus remanded the "takings issue" to the district court

for further proceedings on the jurisdictional question. *Ibid.*[7]

ARGUMENT

Petitioners appear to acknowledge that the court of appeals' decision has little precedential value beyond the precise dispute presented in this case, which, for that matter, the decision did not even entirely resolve on the merits. See Pet. 16-17 ("the conclusory nature of the opinions below do[es] not provide much insight into the courts' reasoning"). Moreover, as discussed below, there is no merit to petitioners' contention that the result in this case is somehow inconsistent with any decision of this Court or of another court of appeals. Thus, at bottom, this certiorari petition amounts to a request for error correction. But that is not ordinarily a basis for this Court's review, and, in any event, there is no error to correct. Further review is therefore not warranted.

1. Much of the analysis in the proceedings below concerned whether the enactment of Section 640 in 1994 conferred an enforceable property interest on the group of plaintiffs—the vast majority of petitioners here (Pet. App. 2a)—who filed claims before June 30, 1994, but who fall within the scope of the 1995 amendment to Section 640.[8] Although the court of appeals remanded

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[7] The United States argued in a petition for rehearing that the remand was unnecessary because petitioners had consistently disavowed any claim for money relief in this action and were seeking exclusively equitable relief on all claims, including the "takings" claim. Petitioners confirmed the same point in their own petition for rehearing. Appellants' Pet. for Reh'g and Suggestion for Reh'g En Banc 11-14. Both petitions were denied. Pet. App. 32a, 33a.

[8] The court of appeals declined, on jurisdictional grounds, to address whether the Takings Clause entitles those petitioners to

for further proceedings on that issue, petitioners have filed this petition alleging independent claims of entitlement, distinct from any claim under Section 640, to the same back pay remedy. Those claims lack merit.

a. The statutory provisions subjecting the United States to back pay liability under the FLSA constitute a waiver of sovereign immunity. See *Hickman* v.

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just compensation in light of the amendment to Section 640 in 1995. Pet. App. 10a-12a. If those petitioners prevail on their just compensation claim on remand, they will obtain the moneys to which they claim entitlement under the alternative theories of recovery presented in this petition. As to them, "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroosook R.R.*, 389 U.S. 327, 328 (1967); accord *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari). If a live dispute involving those petitioners persists after remand, they will retain their right to present to this Court any claim they present here so long as they have preserved it. See, *e.g.*, *Urie* v. *Thompson*, 337 U.S. 163, 172-173 (1949); Robert L. Stern & Eugene Gressman, *Supreme Court Practice* § 4.18, at 198 (7th ed. 1993).

The court of appeals did not explain why, in its view, the claims it decided on the merits fell within its jurisdiction whereas the claims it remanded fell within the exclusive jurisdiction of the Federal Circuit. There is no obvious basis for such a distinction, since petitioners' various claims seek similar forms of relief against the government: mandamus and injunctive and declaratory relief concerning the government's disposition of their administrative claims for federal money. See Pet. App. 8a; see generally Gov't Supp. C.A. Br. 1-14; *Van Drasek* v. *Lehman*, 762 F.2d 1065, 1071 n.11 (D.C. Cir. 1985) ("[j]urisdiction under the Tucker Act cannot be avoided by * * * disguising" what is "essentially a monetary claim in injunctive or declaratory terms") (internal quotation marks omitted). Thus, if certiorari were granted, this Court could confront threshold jurisdictional questions similar to those addressed by the D.C. Circuit but not raised in the petition. See also note 10, *infra*.

United States, 10 Cl. Ct. 550, 552-553 (1986); see generally *Hubbard* v. *Administrator*, 982 F.2d 531 (D.C. Cir. 1992) (en banc). It is axiomatic that such waivers must "be strictly construed, in terms of [their] scope, in favor of the sovereign." *Department of the Army* v. *Blue Fox*, 119 S. Ct. 687, 691 (1999); accord *Lane* v. *Peña*, 518 U.S. 187, 192 (1996); *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 37 (1992); see also Gov't C.A. Br. 29-30.

Petitioners' burden here is formidable. They acknowledge that their position would expose the United States to considerably greater back-pay liability under the FLSA than similarly situated private employers would face. See Pet. 20-24 & nn.11-12. That is so because private-sector employees (as well as the employees of state and local governments) *must* bring any FLSA claim for back wages in federal court subject to the limitations period of the Portal-to-Portal Act, see 29 U.S.C. 216(b) and (c), whereas, under petitioners' position, federal employees could escape that limitations period by initiating administrative proceedings. Petitioners must therefore identify some provision in which Congress "unequivocally expressed" (*Blue Fox*, 119 S. Ct. at 691) an intent to place the United States in that inferior position and to deprive it of the statutory protections to which all other employers are entitled.

Petitioners can make no such showing. The Barring Act, upon which they rely here, does not contain a waiver of sovereign immunity for FLSA claims, much less an "unequivocal expression" of such a waiver (*Nordic Village*, 503 U.S. at 37). The Act nowhere mentions the FLSA, nor does it confer an affirmative entitlement on any class of claimants to a particular statute of limitations. Instead, the Act confers generic "[a]uthority" on a particular federal decisionmaker—

the Comptroller General during much of the period at issue—to "settle claims" against the government in a broad variety of circumstances. 31 U.S.C. 3702 (1994 & Supp. III 1997); see note 3, *supra*. The Barring Act does create an administrative procedure that claimants may invoke as an alternative to filing suit in court—a procedure that the Act itself makes unavailable if the claim is not filed within six years after it accrues, except "as provided in * * * another law." 31 U.S.C. 3702(b)(1)(A). But the Act does not itself create rights to collect money from the public fisc, nor does it enlarge the rights or remedies that claimants may derive from the statutory scheme underlying their claim.

Here that underlying statutory scheme is the FLSA, and "[t]he limitations of the Portal-to-Portal Act are an integral part of the overtime compensation prescribed by the FLSA." *Carter* v. *Panama Canal Co.*, 463 F.2d 1289, 1298 (D.C. Cir.), cert. denied, 409 U.S. 1012 (1972); see also note 11, *infra*. In the Portal-to-Portal Act, Congress imposed a two-to-three-year statute of limitations (together with other restrictions) for all FLSA actions specifically to protect the economic interests of all "employers," who, Congress found, might otherwise face "wholly unexpected liabilities, immense in amount and retroactive in operation." 29 U.S.C. 251(a), 255(a). Congress found that, unless limited, the FLSA would threaten "the Public Treasury" through its impact on *private* employers—*i.e.*, by reducing tax revenues and increasing the cost to the government of purchasing goods and services. 29 U.S.C. 251(a)(8) and (9). But that indirect effect on the Treasury could be dwarfed by the consequences of petitioners' position, which would routinely expose "the Public Treasury" to direct liability for back-pay claims against federal employers

reaching back three times as far as ordinary claims that could be brought against private employers.

Moreover, when Congress amended the FLSA in 1974 to cover federal employees generally, it gave no indication that it wished to treat those employees differently from private-sector employees in this respect or that it intended to expose the public fisc to degrees of liability to which private employers are immune. To the contrary, the legislative record reveals an emphasis on ensuring that the FLSA claims of federal employees would be administered "in such a manner as to assure consistency with" the application of the Act "in other sectors of the economy." H.R. Rep. No. 913, 93d Cong., 2d Sess. 28 (1974). As one court observed in reviewing a pre-1974 amendment extending the FLSA to restricted categories of federal employees (see pp. 2-3, *supra*), Congress "intended to provide for equality of treatment" as between federal employees and their private-sector counterparts, a statutory objective that extends to "the limitations of the Portal-to-Portal Act." *Carter*, 463 F.2d at 1298-1299; see also *AFGE* v. *OPM*, 821 F.2d 761, 769 (D.C. Cir. 1987).[9]

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[9] When the Portal-to-Portal Act was enacted, federal employees were still excluded from the scope of the FLSA, and thus the only applicable enforcement mechanism for any covered class of employees for the collection of back wages was a suit in any "court of competent jurisdiction." 29 U.S.C. 216(b). It is thus no surprise that some provisions of the Portal-to-Portal Act refer to "court[s]." 29 U.S.C. 256; cf. Pet. 18. Congress's failure to amend the Act when it included federal employees within the coverage of the FLSA does not, as petitioners suggest (Pet. 21, 24), constitute an "unequivocal expression" of intent to grant those employees, at public expense, vastly broader back pay rights than any other employee covered by the Act. Quite to the contrary, as discussed in the text, Congress intended for federal and non-federal employees to receive "equality of treatment."

Any doubt about petitioners' failure to show an "unequivocal" waiver of sovereign immunity would be resolved by Section 640 as amended. That provision is significant here not because Congress has the power to "preclud[e] judicial review by implication," Pet. 27 (emphasis omitted), but because any inquiry into whether Congress has unequivocally expressed an intent to waive sovereign immunity must make sense of all relevant provisions of federal law. See, *e.g.*, *Lehman* v. *Nakshian*, 453 U.S. 156 (1981). As amended, Section 640 provides that some FLSA claims filed with the GAO before June 30, 1994 are subject to a six-year statute of limitations. The imposition of that six-year limitations period would serve little purpose if, as petitioners contend, all claimants would be entitled to a six-year limitations period in any event. See also Pet. App. 24a-25a.

Even more important, petitioners' position would render the 1995 amendment a nullity. By carving out exceptions to Section 640, that amendment is obviously intended to ensure that some limitations period *shorter* than six years will apply whenever Section 640 does not. Petitioners' position, however, would entitle claimants to a six-year limitations period whether or not Section 640 applies, and it would drain the 1995 amendment of any significance. That consequence confirms that petitioner's position is wrong, for statutory schemes must be interpreted, if possible, to give each provision operative effect. See, *e.g.*, *Walters* v. *Metropolitan Educ. Enters., Inc.*, 519 U.S. 202, 209 (1997).[10]

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[10] The regime that petitioners would extend to all FLSA claims against the United States would be highly unusual. If an FLSA administrative claim is denied and the claimant then files a court suit, the court does not "review" the administrative determination

b. There is no merit to petitioners' contention that the decision below conflicts with *Unexcelled Chemical Corp.* v. *United States*, 345 U.S. 59 (1953). In that case, the United States charged that a private employer had knowingly employed child labor from 1942 to 1945 in violation of the Walsh-Healey Act (see 41 U.S.C. 35 *et seq.*); it had commenced administrative proceedings in 1947 and had then filed a court suit in 1950. This Court held that the suit was barred by the statute of limitations imposed by the Portal-to-Portal Act, which applies to suits filed under the Walsh-Healey Act (and the Bacon-Davis Act, 40 U.S.C. 276a *et seq.*) as well as

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—which has no effect on the claimant's rights—but considers the claim de novo. *Burich* v. *United States*, 366 F.2d 984, 986-987 (Ct. Cl. 1966) (citing cases), cert. denied, 389 U.S. 885 (1967); *Schulthess* v. *United States*, 3 Cl. Ct. 126 (1983); *Hilton* v. *United States*, 227 Ct. Cl. 734 (1981); see also p. 4, *supra*. Petitioners' position, however, would entitle a claimant to relief in administrative proceedings long after the limitations period for any court action had passed. For that reason, any unsuccessful administrative claimant seeking relief in court after the expiration of that period could not file an ordinary FLSA suit under 29 U.S.C. 216(b). He or she might instead file a suit like this, seeking "mandamus and injunctive and declaratory relief" concerning the disposition of the underlying administrative claim for money. Pet. App. 8a. But there is little precedent concerning whether, and in what forum, the Administrative Procedure Act or some other provision of federal law authorizes federal-court actions of this kind. See Supp. Gov't C.A. Br. 12-14. (Although OPM is an "agency" for purposes of the APA, GAO—the administrative entity in which the administrative actions were initiated—is not. See *Chen* v. *GAO*, 821 F.2d 732, 737 n.6 (D.C. Cir. 1987); 5 U.S.C. 701(b)(1).) As noted above (see note 8, *supra*), uncertainty about that issue, which the court of appeals only cursorily addressed (see Pet. App. 10a-12a), could pose threshold jurisdictional concerns that this Court might need to resolve before reaching the merits of any issue presented in the petition.

the FLSA. Although the Court's decision focused on the applicability of the Portal-to-Portal Act to the suit, the United States had alternatively contended that even if the Act applied, the "action," for purposes of the Act, had "commenced when the administrative proceedings were initiated." 345 U.S. at 66. The proceedings whose timeliness was disputed were not the administrative proceedings themselves but the subsequent court suit, and the government's argument was thus that the administrative proceedings had tolled the statute of limitations for the court suit. The Court rejected that claim, stating that Congress, when it enacted the Portal-to-Portal Act, "was addressing itself to lawsuits in the conventional sense." *Ibid.*

The question presented here, however, is not whether administrative proceedings brought by the United States as plaintiff can toll the limitations period for any subsequent tort suit. The question is whether petitioners have identified some provision of federal law that "unequivocally expresse[s]" a congressional intent to expose the United States as employer to much greater FLSA liability than similarly situated private employers would face. Indeed, *Unexcelled Chemical* did not address the provision on which petitioners rely as a waiver of sovereign immunity: the limitations provision of the Barring Act, which applies only to claims *against* the United States, and which, as discussed, does not in fact waive sovereign immunity. See 31 U.S.C. 3702(b)(1). If anything, this Court's decision in *Unexcelled Chemical* cuts more against petitioners' position than for it. In rejecting the efforts of the United States *as plaintiff* to circumvent the limitations period of the Portal-to-Portal Act, the Court noted the surpassing breadth of Congress's desire to protect employers against the "harsh results" of the FLSA as

previously enforced. 345 U.S. at 61. It would be anomalous to construe that decision as a basis for subjecting the United States *as employer* to precisely the "harsh results" that Congress designed the Portal-to-Portal Act to avoid.

There is also no "conflict[]" (Pet. 16) between the decision below and the concluding footnote of *Glenn Electric Co.* v. *Donovan*, 755 F.2d 1028 (3d Cir. 1985). In that case, the government had brought administrative proceedings as plaintiff against a private employer under, among other statutes, the United States Housing Act of 1937, 42 U.S.C. 1437 *et seq.* (U.S. Housing Act). Although that statute is not among the three to which the Portal-to-Portal Act applies, the employer nonetheless argued that the Act's limitations provision barred the proceedings. The Third Circuit rejected that argument on the ground that the Portal-to-Portal Act is simply inapplicable to proceedings under the U.S. Housing Act. See 755 F.2d at 1031-1034. In a footnote, the court alternatively remarked that, even if the Portal-to-Portal Act *were* applicable to proceedings under the U.S. Housing Act, its limitations period would still be inapplicable on the facts of *Glenn Electric* "[i]nasmuch as the [government's] enforcement action has been entirely administrative." *Id.* at 1034 n.7 (citing *Unexcelled Chemical*).

Whether or not that footnote could plausibly be said to have precedential value, it is entirely consistent with the decision below. Again, the question in this case is whether Congress has "unequivocally expressed" an intention to waive sovereign immunity as to FLSA claims against the United States *as employer* in circumstances where similarly situated private-sector employers would be immune from such claims. Like *Unexcelled Chemical*, *Glenn Electric* did not address

that issue, nor did it address the provision of the Barring Act upon which petitioners erroneously rely in claiming that sovereign immunity has indeed been waived.[11]

2. Finally, petitioners present a diffuse set of arguments (Pet. 27-29) that the manner in which their administrative claims were handled violated due process. Those arguments are factbound and, in any event, without merit.

Petitioners contend that GAO displayed a "lack of genuine investigation into, or interest in, the statutory interpretation questions actually at issue." Pet. 28. But that "due process" argument is wholly derivative of petitioners' own mistaken position on the statutory issue presented here. Although petitioners allege that GAO acted in bad faith in reversing its position on that issue, that allegation is difficult to square with, among other things, the unanimous conclusion of the four federal judges who have reviewed this case that GAO's prior position was "wrong" and that its present one is correct. Pet. App. 21a; accord *id.* at 8a-10a; see also *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401

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[11] Petitioners contend that the decision below is in "tension" with several court of appeals decisions, all of which involved private employers, holding that the limitations provision of the Portal-to-Portal Act may be waived if not properly pleaded as a defense (or that defendants may be estopped from relying on that provision if they fraudulently induce a plaintiff to delay filing suit). See Pet. 23 (citing, *inter alia*, *Hodgson* v. *Humphries*, 454 F.2d 1279 (10th Cir. 1972)). The question here, however, is not whether the government has waived sovereign immunity in the course of this litigation (indeed, sovereign immunity cannot be so waived), but whether Congress has affirmatively and unequivocally waived that immunity to the extent that petitioners claim. The litigation-waiver and estoppel cases that petitioners cite have no bearing on that issue.

U.S. 402, 420 (1971) ("there must be a strong showing of bad faith or improper behavior" before a court will permit "inquiry into the mental processes of administrative decisionmakers"); *Withrow* v. *Larkin*, 421 U.S. 35, 55 (1975) (similar).[12]

Finally, there is no merit to petitioners' claim (Pet. 28) that GAO acted unconstitutionally in failing to process their claims before the 1995 enactment of the amendment to Section 640. Petitioners cite no authority for the proposition that the delay was unlawful, and, in any event, the district court correctly determined that petitioners "did not have a sufficiently developed factual record for their claims and, given the sheer number of [claimants] in this case, would not have had one by the time amended Section 640 was enacted." Pet. App. 29a; see also *id.* at 10a.[13]

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[12] It is well settled that "[a]n administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes." *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402, 417 (1993) (quoting *NLRB* v. *Iron Workers*, 434 U.S. 335, 351 (1978)); see also *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863-864 (1984). There is thus no merit to petitioners' reliance on past statutory interpretations "by the GAO and other agencies" (Pet. 12-15); the cited administrative decisions either concerned statutes other than the FLSA and the Portal-to-Portal Act or were overruled in *Ford* when GAO correctly determined that its previous position had been erroneous. See also *Hickman*, 10 Cl. Ct. at 552 (1986 decision accepting, without discussion, GAO's previous position, which had not yet been overruled).

[13] Petitioners are mistaken in alleging that petitioners' employing agencies had engaged in a "systematic denial of statutorily-mandated wages to thousands of government employees." Pet. 28. As the CFC explained in *Adams*, many of the original classifications given petitioners' jobs by their employing agencies were fully

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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justified, and the others were overturned only after detailed analysis under OPM criteria. See 27 Fed. Cl. at 12-29. Indeed, petitioners did not claim a "willful violation" of the FLSA in their CFC suit, even though such a finding would have entitled them to three years' back overtime pay. See 29 U.S.C. 255(a).

Supreme Court, U.S.
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No. 98-1265

In The
Supreme Court of the United States

STEPHEN S. ADAMS, ET AL.,
Petitioners,

v.

JAMES F. HINCHMAN, ET AL.
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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May 13, 1999

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In The

Supreme Court of the United States

No. 98-1265

STEPHENS S. ADAMS, ET AL.
Petitioners,

v.

JAMES F. HINCHMAN, ET AL.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

The government incorrectly suggests that the question presented here has no broader significance than the instant case. First, the provision of the Portal Act at issue applies, and always has applied, not only to Federal Labor Standards Act ("FLSA") actions, but also to actions under the Walsh-Healey Act and the Davis-Bacon Act -- despite the government's attempt to excise the other two statutes by elision. Op. Cert. 2.[1] Second, the question will affect administrative proceedings with respect to alleged violations of any of these three statutes indefinitely into the future. All three substantive statutes remain in effect, and

[1]The Portal Act provides a two-year limitations period (three years for a willful violation) "to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the *Walsh-Healey Act*, or the *Bacon-Davis Act*." 29 U.S.C. § 255 (citations omitted) (emphasis added).

administrative proceedings remain an option under each of them. And, of course, the outcome of *this* dispute affects the rights of more than 14,000 petitioners.[2]

In defense of its position on the merits, the government's opposition -- apparently recognizing the weakness of the arguments it relied on in the courts below -- raises, for the first time, "sovereign immunity," arguing that sovereign immunity raises the threshold petitioners must meet. Raising that threshold, however, cannot afford the government the shelter it seeks from its obligations.

1. Petitioners have no difficulty in establishing the "clear and unequivocal" standard for waivers of sovereign immunity. The government does not dispute that the 1974 amendments to the FLSA, *see* 88 Stat. 55, 58-60, clearly and unequivocally guaranteed federal employees rights under that Act, and waived objection to being held to account for violating those rights. In the Barring Act, Congress provided an administrative forum available for *all* claims against the United States, as long as those claims are presented to the Comptroller General within six years after accrual. 31 U.S.C.§ 3702(b)(1).[3] Thus, Congress clearly and unequivocally waived sovereign immunity with respect to claims the Comptroller General finds

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[2]The government's suggestion that petitioners might "prevail on their just compensation claim on remand," Op. Cert. 14 n.8, is also groundless. The court below remanded the takings clause issue for the trial court to determine whether it had jurisdiction to have decided the question in the first place. Pet. App. 12a. That court had already found against petitioners on the merits of that claim. *Id.* at 10a.

[3]Congress provided that the Barring Act's limitations period applies to claims submitted to the Comptroller General (since 1996, the Office of Personnel Management) *unless* another provision of that Act or another statute provides a different time period for submitting the claim to the Comptroller General. 31 U.S.C. § 3702(b)(1)(A).

valid, *if* presented within that time period.

2. The government's attempt to disregard the express waiver provided by the Barring Act on the ground that it is a *general* waiver that does not specifically refer to FLSA claims, Op. Cert. 15, and therefore is not sufficiently clear and unequivocal, is inconsistent not only with this Court's decisions but also with the government's own position before this Court *this* Term. In *West v. Gibson*, Docket No. 98-238, the government argued that the provision conferring authority upon the EEOC to provide appropriate remedies for Title VII violations was sufficient to waive sovereign immunity for compensatory damages awards, even though the provision conferring authority *did not mention compensatory damages* and, in fact, was enacted *before* compensatory damages were available for such violations. 1998 U.S. BRIEFS 238, *9, *11-*13 (LEXIS). Furthermore, this Court has not required that waivers of sovereign immunity refer to the precise claim at issue, only that they clearly *encompass* the claim. *See, e.g., United States v. Williams*, 514 U.S. 527, 536 (1995) (rejecting the IRS's sovereign immunity defense from a refund suit on the ground that the tax had been paid on another's behalf because the language of the statute waiving immunity was sufficiently broad to encompass such a claim).

3. The government's attempt to rely on the Portal Act's two-year statute of limitations as a provision that overrides the limitations period provided by the Barring Act rests on policy arguments, Op. Cert. 16. The government does not deny that the Portal Act was enacted to "define and limit the jurisdiction of the courts," 29 U.S.C. § 251(b)(3); that the provisions of the Act repeatedly refer to judicial procedures, *see id.* at §§ 252(d), 252(e), 253, 260; and that the limitations provision itself expressly applies to "actions to enforce" a "cause of action" rather than to claims or complaints triggering

agency proceedings. The government also does not dispute that the limitations provision applies not only to FLSA actions, but also to actions under the Walsh-Healey and Davis-Bacon Acts, Op. Cert. 19, and that there were administrative remedies available under both these Acts at the time the provision was enacted. *See L. Gary Clemente*, 33 Comp. Gen. 66, 67 (1953).[4]

Thus, the text of the Portal Act makes clear that Congress chose to limit the limitations provision to court actions ("Congress . . . knows the difference between a civil action and an administrative proceeding," *Gibson v. Brown*, 137 F.3d 992, 997 (7th Cir. 1998), *cert. granted sub nom. West v. Gibson*, 119 S. Ct. 863 (1999)). And that was the contemporaneous understanding of the implementing agencies. *See L. Gary Clemente*, 33 Comp. Gen. at 67 (noting that the Department of Labor, the agency charged with implementing all three Acts covered by the provision, understood that it "only forecloses resort to *court* action after a two-year period," a position with which the Comptroller General agreed) (emphasis added). Congress has not amended the Barring Act or enacted any other provision purporting to limit the time available for initiating *administrative* proceedings under *any* of the three statutes.[5]

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[4]The government's assertion that the Portal Act's references to court actions simply reflects that the FLSA at the time applied only to private employees, Op. Cert. 17 n.9, disingenuously ignores the fact that the limitations provision applied equally to the Walsh-Healey and Davis-Bacon Acts, for which administrative proceedings *were* available.

[5]It has also been the consistent view of this Court and others that the Portal Act was intended to confine an available remedy, rather than the statutory rights themselves, until the decisions below. *See, e.g., Unexcelled Chem. Corp. v. United States*, 345 U.S. 59 (1953); *Hodgson v. Humphries*, 454 F.2d 1279 (10th Cir. 1972). Contrary to the government's assertion, Op. Cert. 22 n.11, the relevance of these cases does not go to whether the government has waived immunity in this litigation, but to whether the Portal

4. The government's theory that, when Congress extended FLSA rights to federal employees in 1974, it somehow extended the Portal Act's limitations period to administrative proceedings fails for two reasons. First, the 1974 amendments are entirely silent on the question. And they are silent in the face of a well-established rule that the Barring Act's limitation period applies unless Congress makes a different period *expressly* applicable to administrative proceedings. *See, e.g., United States Maritime Comm'n*, 29 Comp. Gen. 54 (1949); *Defense Communications Agency*, 51 Comp. Gen. 20 (1971); *Commodity Credit Corp.*, 41 Op. Att'y Gen. 80, 82 (1951). Moreover, the specific statute of limitation in the Portal Act had been found applicable to judicial actions only. *See L. Gary Clemente*, 33 Comp. Gen. at 67.

Second, the government's argument for reading the 1974

Act can be read to preclude FLSA, Walsh-Healey or Davis-Bacon administrative proceedings if initiated more than two years after the violation. Because the Portal Act imposes a time limit solely on judicial actions, and because that is a limit on the remedy rather than on the right itself, the answer to that question is no. The Portal Act does not limit the availability of administrative remedies under any of these Acts. The sole authority the government relies on for the contrary conclusion does not support its inference. *Carter v. Panama Canal Co.*, 463 F.2d 1289 (D.C. Cir. 1972), did not address the Portal Act's statute of limitation, administrative proceedings or the not-yet-enacted 1974 amendments. *Carter* determined that the Portal Act's definition of non-compensible activities under the FLSA prevailed over pre-existing federal pay provisions for federal employees in the Canal Zone, because the 1967 FLSA amendments were intended to replace other federal pay provisions for these employees. Two years later, when Congress extended FLSA benefits to federal employees generally, it took care to preclude such a decision with respect to the 1974 amendments by making clear that pre-existing federal employment provisions remained in effect alongside the newly applicable FLSA provisions. *See, infra*, pp. 6-7. Whatever the status of *Carter* with respect to Canal Zone workers, it has no bearing on the dispute here, or on any dispute under the 1974 FLSA amendments.

amendments to extend the Portal Act's limitations period to administrative proceedings founders on its mistaken premise: that Congress intended absolute parity between federal and private employees.[6] Although Congress did intend the 1974 amendments to provide federal employees with rights hitherto available only to private employees, as the legislative history the government cites establishes, it is *not* true that Congress intended to limit federal employees to *only* those rights.

Thus, the legislative history details Congress' intention to permit pre-existing federal employee rights to co-exist with the new FLSA rights. *See, e.g.*, H.R. Rep. No. 93-913, at 28 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2836-38 (explaining that federal employees would continue to enjoy premium pay provisions under Title 5, 5 U.S.C. § 5542(a) -- pay provisions *not* available to private employees). Because federal employees were placed in a very different position than private employees, Congress conferred the authority to interpret and administer FLSA provisions with respect to *federal* employees on the Civil Service Commission (now OPM), which administered other federal employment provisions. 29 U.S.C. § 204(f). In contrast, the Secretary of Labor interprets and administers FLSA provisions as they apply to *private* employees. The regulations adopted by the two agencies are not always identical.

Under this scheme, federal employees may be entitled to greater benefits than similarly situated private employees. Overtime pay for federal employees, for example, is regulated under both the FLSA and Title 5. When "there is an inconsistency between the statutes, [federal] employees are

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[6] Indeed, in the Court of Federal Claims ("CFC") suit that preceded this case, the government argued that Congress did *not* require parity between federal and private employees. *See* Feb. 24, 1992 Gov. Br. in *Adams v. United States*, No. 90-162C (and consolidated cases) at 32-36.

entitled to the greater benefit." *Henry G. Tomkowiak*, 67 Comp. Gen. 247, 250 (1988). Because the statutes calculate eligibility differently, which statute provides the greater benefit depends on the specific circumstances. In contrast, only FLSA overtime is available to private employees.

Congress differentiated between federal and private employees in other significant ways as well. For example, federal employees may count their leave hours as hours worked for FLSA purposes, because of the interaction of the FLSA and federal leave statutes; private employees may not. *Lanehart v. Horner*, 818 F.2d 1574 (Fed. Cir. 1987). Congress also differentiated between private employers and itself, authorizing private employers to assert Secretary of Labor opinions as a defense to FLSA claims. *Berg v. Newman*, 982 F.2d 500, 503-04 (Fed. Cir. 1992). It provided no such defense to itself.[7]

In addition, Congress provided different means for redressing grievances under the FLSA to private and federal employees. Although both may bring individual judicial actions, private employees' rights may also be vindicated through class actions brought by the Secretary of Labor. *See* 29 U.S.C. § 216(c). No such procedure is available to federal employees. Federal employees, however, may submit FLSA claims to the

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[7]The government's policy argument that Congress would not subject itself as an employer to harsher results than it permits to be inflicted on private employers, Op. Cert. 21, is thus inconsistent with the statute Congress enacted. Nor is it compelling as policy. Congress could reasonably choose to hold the government to a higher standard for complying with its own law, especially in light of its unique ability to borrow money and undertake projects notwithstanding the size of its open-ended obligations. Further, the Barring Act's limitations period provides the Comptroller General (now, OPM) with a consistent limitations period regardless of which of the overlapping statutes that supply the substantive rules for federal employment is ultimately determined to govern a particular claim.

Comptroller General (now, the OPM) -- an option not available to private employees. When the Civil Service Commission -- the agency Congress entrusted to administer *federal* employees' FLSA rights -- determined that the Barring Act's six-year limitations period applies to Comptroller General proceedings, it was with respect to a remedy Congress had not provided to *private* employees.[8] This did not mean, contrary to the government's protestations, Op. Cert. 15-16, that Congress subjected private employers and the United States to different liabilities under the FLSA. Private employers are subject to precisely the same liabilities as the United States for violations of the FLSA -- unless the private employees sit on their rights. But Congress made a different range of remedies available to each type of employee, providing an administrative remedy, with its attendant limitations period, only to federal employees.[9]

5. Section 640 cannot provide the government with the support it needs. Section 640 does not, either as originally enacted or as amended, purport to establish a prospective

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[8]The Civil Service Commission promulgated its decision in Federal Personnel Manual Letter 551-15 (issued July 11, 1978), explaining: "In accordance with our authority to administer the FLSA under Section 4(f) of the Act, we will order retroactive wages, if the claim is valid, for a six-year period, dated from receipt of the claim by the Commission." Based on the Commission's views, which were expressly solicited as well as consistent with its own long-standing precedent, the Comptroller General applied the Barring Act's limitations period to FLSA administrative claims, *see, e.g., Transportation Systems Center*, 57 Comp. Gen. 441 (1978), until petitioners' extensive claims were pending. *See Joseph M. Ford*, 73 Comp. Gen. 157 (1994).

[9]The government itself points out another distinction Congress permitted with respect to remedies, Op. Cert. 22 n.11. Private employees may prevail in an untimely judicial action if their employers neglect to assert a statute of limitations defense early in the litigation. For federal employees, however, the government, or a court, may raise untimeliness *at any point*.

limitations period rule, or to decipher the rule available under existing legislation. Section 640, attached to an omnibus budget bill, purported only to accord special protection to certain pending claims. The subsequent amendment, attached to a later budget bill, simply withdrew some but not all of that special protection. And despite its sponsor's rhetoric, even the amendment does not attempt to impose absolute parity between private employees and the pending claims of federal employees (*some* pending administrative claims of federal employees remain specially protected).

6. Finally, the government's attempt to wish away the decisions interpretating the Portal Act's limitations provision as governing only judicial actions is puzzling. *See* Op. Cert. 19, 21. There cannot be any dispute that this Court in *Unexcelled Chemical*, and the Third Circuit, in *Glenn Electric Co. v. Donovan*, 755 F.2d 1028 (3d Cir. 1985), interpreted the same text of the same provision of the Portal Act that the government relies on here, and reached the opposite conclusion as to its scope. The government nonetheless claims there is no conflict between those decisions and the decision below, pointing to the difference between interpreting the scope of the provision when sovereign immunity is not at issue and interpreting the scope of the provision when sovereign immunity is implicated. Op. Cert. 20, 21. For there to be no conflict, however, the government is necessarily arguing that when sovereign immunity is not implicated -- *i.e.*, when the government proceeds against private contractors for violations of labor laws -- the provision limits only judicial actions. But, when sovereign immunity is implicated -- *i.e.*, when federal employees submit administrative claims against the government -- the same words of the same provision have a different meaning altogether. In that circumstance, the provision applies to administrative proceedings also. In other words, the same statutory provision has diametrically opposite meanings depending on what side of

the docket the government finds itself.

This argument is typical of the government's various positions, and actions throughout this litigation; the only consistency is the government's determination not to honor its debts. The government's claims that it has not acted lawlessly is based largely on a misunderstanding of the facts. *See* Op. Cert. 23, n.13. Petitioners did assert, both in the CFC and before the Comptroller General, that the employing agencies had acted *willfully* in claiming exemptions, thus triggering the three-year limitations period under the Portal Act for judicial actions. *See, e.g.*, J.A. 187, 264. And none of the employing agencies' classifications have been upheld. The CFC's initial decision finding some classifications lawful has since been reversed by the Federal Circuit. *Adams v. United States*, Docket No. 98-5011, 1998 U.S. App. LEXIS 23565 (Fed. Cir. Sept. 23, 1998).

CONCLUSION

The petition for a writ of certiorari should be granted.

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